In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-959

VINCENT R. PERRIN, JR., Petitioner

versus

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PERRIN C. BUTLER
Suite 1215
144 Elk Place
New Orleans, Louisiana 70112

Mr. Robert G. Haik
Attorney at Law
P. O. Box 4260
New Orleans, Louisiana 70178

A B Letter Service, I

INDEX

INDEX (Continued)

CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO.

VINCENT R. PERRIN, JR., Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Vincent R. Perrin, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 20, 1978.

OPINION BELOW

The opinion of the Court of Appeals, appears in 580 F. (2d) 730, and is attached as Appendix A. No opinion was rendered by the District Court for the Eastern District of Louisiana.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 20, 1978. A timely petition for rehearing was denied on November 15, 1978. A copy of the Notice to Deny Rehearing is attached as Appendix B.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

I. Whether "commercial bribery" of a private employee, defined as a misdemeanor in 14 La. R.S. 73, is embraced within the meaning of the term "bribery" as used in the Travel Act, 18 U.S.C. 1952 (1976).

II. Does the record in this case contain sufficient evidence to support the conviction of Vincent R. Perrin, Jr., Petitioner.

III. Should Petitioner Perrin's trial have been severed from the trial of his co-defendants to preserve his constitutional right to a non-prejudicial, fair trial.

IV. Should Petitioner Perrin's motion for acquittal have been granted.

V. Whether the conflict of opinion between Circuits and the decision below raise significant problems concerning the administration and enforcement of the Travel Act.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1952 (1976) provides:

"Interstate and foreign travel or transportation in aid of racketeering enterprise.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to -

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any *business enterprise* involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the controlled Sub stances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended

Pub. 1. 91-513, Title II Sec. 701 (i)(2), Oct. 27, 1970, 84 Stat. 1282." (Emphasis supplied)

14 Louisiana Revised Statutes 73 provides:

"Commercial Bribery.

Commercial bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any *private* agent, employee, or fiduciary, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's, or fiduciary's action in relation to the principal's or employer's affairs.

The agent's employee's, or fiduciary's acceptance of or offer to accept, directly or indirectly, anything of apparent present or prospective value under such circumstances shall also constitute commercial bribery.

Whoever commits the crime of commercial bribery shall be fined not more than five hundred dollars, or be imprisoned for not more than six months, or both."
(Emphasis supplied)

STATEMENT OF THE CASE

Petitioner Vincent R. Perrin, Jr. was convicted by a jury in the District Court for the Eastern District of Louisiana for having violated and conspiring to violate the Travel Act, 18 U.S.C. 1952 (1976). He was charged with having used interstate facilities to undertake a commercial bribery scheme, which occurred on and prior to July 16, 1975 in violation of the Louisiana Commercial Bribery Statute, 14 La. R.S. 73. The record shows that Petitioner Vincent R. Perrin, Jr.,

a subsurface geologist, had been employed for the first and only time by the "criminal shark" and "target" of the federal government on July 24, 1975, at which time he saw fleetingly for the first and only time before the Grand Jury investigation, one sheet of the "seismographic materials" which he was later told on August 4, 1975 that said "Seismographic material" "was stolen".

The facts found that co-defendants Levy and Lafont organized a corporation specifically designed to receive profits from the exploitation of stolen seismic exploration data. No proof exists that Petitioner Perrin had any knowledge whatsoever of said corporation, that it was to receive profits, as to who participated in the theft of said "seismographic data", as to who was the employer of the private person allegedly bribed by said alleged conspirators or any other details whatsoever in connection with the prior occurring alleged theft. The jury found Petitioner Vincent R. Perrin, Jr. guilty and he was sentenced to a term of two years which was suspended while Perrin was placed on probation.

Petitioner Vincent R. Perrin, Jr. appealed his case to the Court of Appeals for the Fifth Circuit. That Court, by a divided vote, found that commercial bribery was embraced by the term "bribery" as used in the Travel Act and that, therefore, petitioner was guilty of having violated that Act. Although this was a case of first impression for the Fifth Circuit, this question has already been presented and decided by two other Courts of Appeals, *U.S. v. Brecht*, 540 F. 2d 45 (1976) 2d Cir.,; and *U. S. v. Pomponio*, 511 F.2d 953 (1975) 4th Cir., cert. denied 423 U. S. 874, 96S. Ct. 142, 46 L. Ed. 2d 105. The decisions in these two cases are conflicting. The Second Circuit found that the misdemeanor

offense of commercial bribery is not within the meaning of the term bribery as used in the Travel Act and the Fourth Circuit found that "bribery" as used in the Travel Act does encompass the scheme of commercial bribery.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT BETWEEN CIRCUIT COURTS OF APPEALS (SECOND, FOURTH AND FIFTH) AS TO WHETHER OR NOT COMMERCIAL BRIBERY IS WITHIN THE PURVIEW OF THE FEDERAL TRAVEL ACT, 18 U.S.C. 1952 (1976 .)

Commercial bribery is a statutory offense commonly (as in the case at bar) classified as a misdemeanor punishable by imprisonment of not more than six months and/or a fine or not more than $500.00. It involves the bribing of private employees who are not public officials. Common law bribery involves the corruption and bribing of public officials in return for official action. The two are completely distinct crimes.

U.S. v. Pomponio, 511 F.2d 953 (1975), a Fourth Circuit case, was the first case to deal with the issue of whether or not the term "bribery" as used in the Travel Act, 18 U.S.C. 1952 (1976) encompasses the misdemeanor crime of commercial bribery. That Court held that to say that commercial bribery was not encompassed by the term "bribery" in the Travel Act would be "giving the term an unnaturally narrow reading.", 511 F. 2d at 957. Therefore the Travel Act was held to encompass the misdemeanor of commercial bribery.

The Second Circuit, in a later caee, however, held to the

contrary. *U. S. v. Brecht*, 540 F. 2d 45 (1976). After a lengthy summary of the legislative history of the Travel Act, excerpts of which legislative history are annexed hereto as Appendix C, and the differences set forth in New York law between bribery and commercial bribery, the Court concluded that "we see no evidence of congressional intent to bring 'commercial bribery' within the scope of the Travel Act." 540 F.2d at 50.

The Court continued:

> "The *Nardello* Court (*U. S. v. Nardello*, 393 U.S. 286 (1969) noted that the Travel Act was primarily designed to stem the clandestine flow of profits to organized crime **and gave 'shakedown rackets' and 'loansharking' as illustrations of methods used by organized crime to generate income. *Id.* at 295, 89 S. Ct. 534. To include 'commercial bribery', which typically is not a feature of organized crime and was not subsumed under the traditional offense of bribery, in the coverage of the Travel Act, simply because it contains the word 'bribery', would be to accept a literalism which the Court did not approve by its reasoning in *Nardello*.***540 F. 2d at 50.

A majority of the Hearing Panel of the Court below agreed with the former case, *U. S. v. Pomponio, supra*. Judge Thornberry reasoned that even though the primary impetus for the enactment of the Travel Act was to curb crimes of the underworld, it cannot be implied that only those kinds of crimes were the ones outlawed by the Travel Act. He also agreed with the *Pomponio* Court in stating that "brib-

ery" should be used in its generic sense and not limited to its common law definition.

However in a strong dissent, Judge Alvin Rubin stated that a classic limitation on criminal law enforcement is that "there should be no punishment without prior statutory mandate." He continues harshly by saying:

> "My brethren require four pages of dialectic to determine that the unadorned word 'bribery' in the Travel Act provides authority for the punishment by the Federal Government of 'commercial bribery.' The layman would scarcely choose so uncertain a route to define a clear proscription, nor indeed would the Second Circuit, *United States v. Brecht*, 2d Cir., 1976, 540 F.2d 45, *Cert. denied*, 1977, 429 U.S. 1123, 97S. Ct. 1160, 51 L.Ed. 2d 573." 580F. 2d 730, at 738

These conflicts justify the grant of certiorari to review the judgment below.

II. The record in this extremely complicated and technical case contains insufficient evidence to convict Petitioner Vincent R. Perrin, Jr., said record not affording proof beyond a reasonable doubt that Perrin:

(a) knew that the alleged conspiracy between his co-defendants and others existed;

(b) agreed to join said conspiracy;

(c) had any interest in or even knew of the existence of

the corporation organized by his co-defendants, or that Perrin had any interest therein;

(d) had any stake whatsoever in said alleged conspiracy, *U. S. v. Cianchetti*, 315 F(2d) 584 (2nd Cir 1977), *U. S. v. Di Re*, 159F(2d) 818 (2nd Cir. 1947) Affo. 322 U. S. 581

(e) knowingly, willfully and intentionally participated in any conspiracy or did or attempted to do something to further that conspiracy;

(f) knew that the alleged seismographic materials had been stolen on July 16, 1975 pursuant to a conspiracy to bribe private employee Willis, who was the government informer. Perrin was employed as a consulting geologist in behalf of the "criminal shark" and "target" of the Federal Government's prosecutors on July 24, 1975,eight days after the completion of said alleged theft and delivery of the stolen materials to one of Perrin's co-defendants. The majority opinion's conclusion that gravity maps were necessary for the geological analysis and exploitation of the stolen data so that the corporation formed to exploit said data would make a profit is merely the ipsi dixit of the government prosecutor and incontrovertibly proved to the contrary by the testimony of Petitioner Perrin and also by the testimony of expert witness Aycock.

III The government's case against Petitioner Perrin should have been severed. He was not a conspirator and his defense was antagonistic to those of his co-defendants.

Perrin took the stand at the trial after having freely testified before the Grand Jury.

IV. Petitioner Perrin's motion for acquittal should have been granted. Since Perrin was not a conspirator, the evidence contained in 44 government orchestrated tapes was extremely prejudicial to Petitioner Perrin and deprived him of his constitutional right to a fair trial, said tapes being pure hearsay as to Perrin. Furthermore, one of said tapes (Tape No. 6) conclusively proves that Perrin could not have possessed the necessary criminal and willful knowledge and intent to commit any crime as he was not even informed that the alleged seismographic materials were "stolen" until after Perrin was induced by the government informer to select a premarked interstate nexus, necessary to transform the alleged local commercial bribery theft misdemeanor into a federal felony under the Travel Act.

V. THE CONFLICT OF OPINION BETWEEN CIRCUITS AND THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE ADMINISTRATION AND ENFORCEMENT OF THE TRAVEL ACT.

In order to properly administer and enforce the Travel Act, it is necessary to know whether or not misdemeanor crimes, like commercial bribery, can legally be transformed into federal felonies through the use of the Travel Act.

There have been a number of cases reported since 1971 which have pointed out the fact that this statute may, if not interpreted correctly, cause substantial interference in federal-state relationships. *Rewis v. U. S.*, 401 U.S. 808, 91 S. Ct. 1056, 28 L.Ed. 2d 493 (1971); *U.S. v. Bass*, 404 U.S. 336, 92S.Ct. 515, 30 L.Ed. 2d 488 (1971); *U.S. v. Archer* 486 F.2d 670 (2nd Cir., 1973). As Judge Friendly said in the *Archer* case:

> "if read literally, (the Act) would cover a $10 payment to fix a traffic ticket if only the person desiring the fix walked across a state line to pay off the policeman." 486 F.2d at 679.

The legislatiive history is clear in that the Travel Act was a manifestation of Attorney General Robert Kennedy's attack on organized crime. The Travel Act was clearly designed to aim at those underworld leaders who direct business enterprises involving the proscribed activities and reside in one state but carry on their illegal activities in another. (See Appendix C attached hereto; see also *U.S. v. Nardello, supra* at 290; and *Rewis v. U.S., supra* at 811).

The dissenting opinion of Circuit Judge Alvin B. Rubin correctly reflects the intention of Congress that the Travel Act should proscribe and be limited to the use of interstate facilities by vice barons, organized criminals and racketeers, in furtherance of one or more business enterprises, which business enterprises are specifically limited to gambling, liquor, narcotics, prostitution, and extortion or bribery and corruption of local public officials, and does not even include murder. (See Appendix C page 43)

Realizing that underworld criminal activity was the target of this legislation, an expansive construction of this Act would not only place a heavy strain on federal-state relationships, but would transform traditionally local criminal con-

duct into federal crimes and require a substantial increase in federal police resources. (See *U.S. v. Bass, supra* at 349; *Rewis v. U. S., supra* at 812).

Finally, the already completed offense of which Petitioner Perrin was convicted is a local misdemeanor, punishable by a maximum of six months imprisonment and/or $500 fine. The Court below, on the basis of such isolated, minimal, inconsequential and non-essential use of interstate facilities as found in this record, declared that there was sufficient interstate commerce to transform a completed local misdemeanor into a federal felony.

Thus, Petitioner Vincent R. Perrin, Jr., who is not a vice-baron engaged in a business enterprise involving the proscribed activities but who for 20 years enjoyed an excellent reputation as a consulting subsurface geologist, as testified to by U.S. District Judge Lansing L. Mitchell, and who did not knowingly, willfully and intentionally commit any crime, was subjected to a prejudicial trial riddled with hearsay evidence along with two conspirators - simply because the word "bribery" appears in both the local and federal statutes. The great American bastion of freedom, based upon our constitutional guaranty of free speech and a fair trial was not built upon such dialectics nor will it long endure if such dialectics are permitted to veil the eyes of justice.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

PERRIN C. BUTLER
Suite 1215
144 Elk Place
New Orleans, Louisiana

AFFIDAVIT OF SERVICE

State of Louisiana
Parish of Orleans

Personally appeared Perrin C. Butler who declared under oath that he is a member of the bar of the State of Louisiana, he is counsel of record for Petitioner, Vincent R. Perrin, Jr., he intends to enter his appearance in and become admitted to the Bar of the Supreme Court of the United States, that copies of the foregoing have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, Eric Gisleson, Attorney, Organized Crime and Racketeering Field Office, U.S. Department of Justice, 500 Camp Street, New Orleans, Louisiana, 70130, and on all other attorneys of record in this case by depositing same in the United States Mail properly addressed with adequate postage this 14th day of December, 1978.

Sworn to and subscribed before
me this day of
December, 1978.

Notary Public
My Commission Expires
at my Death.

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Vincent R. PERRIN, Jr., David L. Levy
and Duffy J. LaFont, Jr.,
Defendants-Appellants.**

No. 76-3926.

United States Court of Appeals,
Fifth Circuit.

Sept. 20, 1978.

Defendants were convicted before the United States District Court for the Eastern District of Louisiana at New Orleans, Morey L. Sear, J., of violating and conspiring to violate the Travel Act, and they appealed. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) a Travel Act violation may be based on commercial bribery in violation of a state's commercial bribery statute; (2) Louisiana commercial bribery statute, since it prohibits behavior about which men of common intelligence need not guess, is not unconstitutionally vague; (3) sufficient interstate nexus existed to establish jurisdiction under the Travel Act, and (4) Government did not act improperly by artificially supplying interstate nexus to local crime in order to make out elements of Travel Act violations.

Affirmed.

Alvin B. Rubin, Circuit Judge, filed a dissenting opinion.

1. Commerce ⇐82.5

Although primary impetus for the Travel Act in Congress was fight against organized crime, limitation on Travel Act to outlaw only crimes "typically associat-

ed with the underworld" would be tantamount to implying additional elements to the Act; similarly, it is not a requirement of the Act that underlying crime be one typically associated with underworld or organized crime. 18 U.S.C.A. § 1952.

2. Commerce ⇐82.5

Membership in organized crime is not element of offense of violating Travel Act. 18 U.S.C.A. § 1952.

3. Bribery ⇐1(1)

Congress, in writing the Travel Act, did not intend to outlaw only the bribery of public officials while simultaneously prohibiting the disregard of a fiduciary duty in a myriad of other circumstances. 18 U.S.C.A. § 1952.

4. Bribery ⇐1(1)

Congress in enacting the Travel Act, which specifically outlaws extortion, bribery or arson in violation of state laws, intended "bribery" to be used in its generic sense and not to be limited to its common-law meaning, and thus Travel Act violation could be based on commercial bribery in violation of state commercial bribery statute. 18 U.S.C.A. § 1952; LSA–R.S. 14:73.

See publication Words and Phrases for other judicial constructions and definitions.

5. Bribery ⇐2

Louisiana commercial bribery statute, since it prohibits behavior about which men of common intelligence need not guess, is not unconstitutionally vague. LSA–R.S. 14:73.

6. Criminal Law ⇐1134(3)

Where scheme involving theft of certain seismic exploration charts and organization of corporation to exploit stolen data was far within core meaning of Louisiana commercial bribery statute,

Court of Appeals did not have to consider whether statute was overly broad. LSA–R.S. 14:73.

7. Bribery ⇐1(1)

Where it was undisputed by defendants that gravity maps, for which appropriate order forms were sent via interstate bus, would have been used to exploit stolen seismic data, requirements for jurisdiction under the Travel Act were met in connection with indictment charging defendants with use of interstate facilities with intent to promote commercial bribery scheme in violation of laws of Louisiana. 18 U.S.C.A. § 1952; LSA–R.S. 14:73.

8. Bribery ⇐1(1)

There is no requirement that use of interstate facilities be essential to bribery scheme to support jurisdiction under the Travel Act; it is enough that interstate travel or use of interstate facilities makes easier or facilitates unlawful activity. 18 U.S.C.A. § 1952.

9. Bribery ⇐1(1), 11

One defendant's telephone call to Texas for purpose of ordering corresponding gravity maps to be used to exploit stolen seismic data constituted sufficient use of interstate facilities to support defendants' conviction under count of indictment charging that defendant made such a call; moreover, evidence supported Travel Act jurisdiction under count charging use of interstate facilities to promote commercial bribery scheme where defendants directed another to make interstate telephone call. 18 U.S.C.A. § 1952; LSA–R.S. 14:73.

10. Criminal Law ⇐37(6)

Government, which reminded informer to be a follower and not a leader in bribery scheme, did not act improperly by artificially supplying interstate nexus to local crime in order to make out ele-

ments of Travel Act jurisdiction, especially in view of evidence making it clear that one defendant knew significance of selecting an out-of-state source for gravity maps used to exploit stolen seismic data and fully appreciated fact that out-of-state supplier was less likely to notice leasing activity in northern Louisiana. 18 U.S.C.A. § 1952.

11. Commerce ⇐82.10

Under the Travel Act, specific intent is required to violate state law but there is no requirement that defendant either have knowledge of use of interstate facilities or specifically intend to use interstate facilities, and thus there is no necessity to inform jury that defendant had to intend to use interstate facilities. 18 U.S.C.A. § 1952.

12. Commerce ⇐82.5

Under a substantive Travel Act charge, it is enough for jury to determine that defendant in fact used interstate facilities, and defendants' argument that Government improperly obtained jurisdiction was for district court to determine as matter of law. 18 U.S.C.A. § 1952.

13. Criminal Law ⇐622(2)

Defendant, who proffered no evidence that was denied admission because of joint nature of trial, was not entitled to separate trial just because he wished to comment on failure of other defendants to testify.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, THORNBERRY and RUBIN, Circuit Judges.

THORNBERRY, Circuit Judge:

Appellants, Vincent Perrin, Jr., David Levy, and Duffy LaFont, Jr., appeal from jury convictions for violating and conspiring to violate the Travel Act.[1] The indictment charged that the appellants[2] used interstate facilities with the intent to promote a commercial bribery scheme in violation of the laws of the State of Louisiana.[3] The proof adduced at trial demonstrated that appellant LaFont approached an employee of the Petty-Ray Geophysical Company, Roger Willis, and proposed that Willis steal from his employer certain seismic exploration charts. In return for the theft, Willis was to receive a percentage of the profits of a corporation specifically organized by appellants Levy and LaFont

1. 18 U.S.C. § 1952 reads in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the

to exploit the stolen data. Appellant Perrin, a consulting geologist, was to interpret and analyze the data stolen from Petty-Ray.

All the defendants were found guilty of the conspiracy count. Perrin was also found guilty of two substantive counts charged in the indictment. Levy and LaFont were adjudged guilty of four substantive violations of the Act. Perrin received a one-year suspended sentence on each count. Defendants LaFont and Levy received a two-year sentence for each conviction. All of the sentences are to run concurrently. Since no appellant challenges the sufficiency of the evidence, it is unnecessary to burden this opinion with further factual details.

Treasury. As amended Pub.L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

2. Along with the appellants, Albert Izuel and Jim Haddox were also charged in the indictment. Izuel and Haddox were severed by the trial court on the second day of trial and the charges against them were ultimately dismissed.

3. Louisiana's Commercial Bribery Statute reads:

> Commercial bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any private agent, employee, or fiduciary, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's, or fiduciary's action in relation to the principal's or employer's affairs.
>
> The agent's, employee's, or fiduciary's acceptance of or offer to accept, directly or indirectly, anything of apparent present or prospective value under such circumstances shall also constitute commercial bribery.
>
> . . . . .
>
> Whoever commits the crime of commercial bribery shall be fined not more than five hundred dollars, or be imprisoned for not more than six months, or both.

14 La.R.S. 73

I.

In their first point of error, the appellants contend that commercial bribery as defined in 14 La.R.S. 73 is not "bribery" within the meaning of the Travel Act. While this is a question of first impression in this circuit, sister circuits have split over the issue. In *United States v. Brecht*, 540 F.2d 45 (2 Cir. 1976) the Second Circuit held that Congress did not intend to include commercial bribery within the meaning of "bribery" as used in the Travel Act. The Second Circuit noted that the legislative history of the Travel Act shows that Congress enacted the Travel Act "for the purpose of punishing interstate travel in aid of racketeering enterprises engaged in by organized crime." 540 F.2d at 49. Furthermore, the court observed that commercial bribery "is not a feature of organized crime and was not subsumed under the traditional offense of bribery." *Id.* at 50. In *United States v. Pomponio*, 511 F.2d 953 (4 Cir. 1975), *cert. denied*, 423 U.S. 874, 96 S.Ct. 142, 46 L.Ed.2d 105, the Fourth Circuit reached the opposite conclusion. In *Pomponio*, the court held that the term "bribery" as used in the Travel Act includes commercial bribery. In reaching its conclusion, the Fourth Circuit noted that all bribery involves moral turpitude and that in *United States v. Nardello*, 393 U.S. 286, 89 S.Ct. 534, 539, 21 L.Ed.2d 487 (1969), the Supreme Court cautioned against an unnaturally narrow reading of the terms of the Travel Act. 511 F.2d at 956-957.

4. At oral argument, the defendants urged that the Travel Act applied only to organized crime and that the single instant of commercial bribery in this case did not amount to organized crime. Membership in organized crime is not an element of the offense. *United States v. Hedge*, 462 F.2d 220 (5 Cir. 1972). *See also United States v. Polizzi*, 500 F.2d 856 (9 Cir. 1974), *cert. denied*, 419 U.S. 1120, 95 S.Ct. 802,

[1, 2] For the reasons enumerated below, we believe that *Pomponio* is the correct reading of the Travel Act and the term "bribery" is a generic one not limited to its meaning in common law. First, we recognize as did the Second Circuit in *Brecht*, that the primary impetus in Congress for the Travel Act was the fight against organized crime. We cannot imply from this recognition, however, that only crimes "typically associated with the underworld" are the ones outlawed by the Travel Act. Such a limitation on the Travel Act would be tantamount to implying an additional element to the Act.[4] The Supreme Court has recently held that the Hobbs Act, 18 U.S.C. § 1951, does not contain a "racketeering" element. *United States v. Culbert*, —— U.S. ——, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978). Similarly, we find that it is not a requirement of the Travel Act that the underlying crime be one typically associated with the underworld or organized crime. We genuinely doubt our expertise to make such a determination.[5]

Furthermore, common experience has taught us that organized crime does not limit bribery to bribery of public officials. Few will ever forget the most notorious commercial bribe in American history—the bribing of the 1919 Chicago White Sox baseball team. In that sad episode, Abe Attell, supposedly an employee of the New York gambler, Arnold Rothstein, bribed eight players of the Chicago White Sox to throw the first

42 L.Ed.2d 820 (1975); *Marshall v. United States*, 355 F.2d 999 (9 Cir. 1966), *cert. denied*, 385 U.S. 815, 87 S.Ct. 34, 17 L.Ed.2d 54 (1966).

5. Alternately, one could argue that there is no faster way to make a certain crime one commonly found in the repartee of the underworld than to make a judicial pronouncement that the crime is not one used commonly by the underworld.

and second games of the 1919 World Series to the Cincinnati Reds. Attell paid Eddie Cicotte, Oscar "Happy" Felsch, Chick Gandil, "Shoeless" Joe Jackson, Freddy McMullin, Charles "Swede" Risberg, George "Buck" Weaver, and Claude Williams about $70,000 for their participation in the scheme.[6] *See* E. Asinof, Eight Men Out (1963).

[3] Second, it is clear, that the Congress itself has not limited bribery concepts to common law definitions. In various places in the United States Code, Congress has outlawed bribery of public officials,[7] bribery of witnesses,[8] bribery of athletes,[9] bribery of bank officers,[10] bribery of agents and employees of carriers by rail,[11] bribery of licensed classifiers of cotton or any grain,[12] and bribery in connection with quiz shows.[13] Certainly, Congress, in writing the Travel Act, did not intend to outlaw only the bribery of public officials while simultaneously prohibiting the disregard of a fiduciary duty in a myriad of other circumstances.

Last, we agree with the Fourth Circuit that *United States v. Nardello, supra*, presents a ready parallel to the case at bar. In *Nardello*, the defendant was charged with a scheme involving the unlawful activity of blackmail in violation of the laws of Pennsylvania. 89 S.Ct. at 535. Since the Travel Act specifically outlaws only "extortion, bribery, or arson in violation of the laws of the State

6. After the bribe was discovered a small boy is said to have approached "Shoeless" Joe Jackson and exclaimed, "Say it ain't so, Joe."
Chicago Herald & Examiner, September 30, 1920.

7. 18 U.S.C. § 201

8. 18 U.S.C. § 201

9. 18 U.S.C. § 224

10. 18 U.S.C. § 215

11. 49 U.S.C. § 1(17)

in which committed or of the United States," Nardello argued that blackmail in violation of State law was not within the ambit of the Act.[14] Furthermore, Nardello urged that in using the term extortion, Congress intended only its common law meaning of acts by a public official. *Id.* at 538. In rejecting Nardello's arguments the Court stated:

> In light of the scope of the congressional purpose we decline to give the term "extortion" an unnaturally narrow reading, cf. *United States v. Fabrizio*, 385 U.S. 263, 266–267, 87 S.Ct. 457, 459, 17 L.Ed.2d 351 (1966), and thus conclude that the acts for which appellees have been indicted fall within the generic term extortion as used in the Travel Act.

89 S.Ct. at 539.

[4] Applying these concepts to the instant case, we believe that Congress intended the term "bribery" to be used in its generic sense and not be limited to its common law meaning. *See also United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957) (refusing to define "stolen" as used in the Dyer Act, 18 U.S.C. § 2312, as meaning common law larceny). We believe it would be incongruous to read the term "extortion" in its generic sense while reading the term "bribery" in the literal common law sense. We therefore conclude that a Travel Act violation may be based on

12. 7 U.S.C. §§ 60, 85

13. 47 U.S.C. § 509

14. Nardello could not have been charged under Pennsylvania extortion statute because Pennsylvania defined extortion as did the common law, *i. e.*, a public official who under color of office obtains the property of another not due either to the office or the official.

89 S.Ct. at 536.

commercial bribery in violation of a state's commercial bribery statute.

II.

[5, 6] In their next point of error, the appellants contend that the Louisiana Commercial Bribery Statute is unconstitutional in that it is vague and overly broad. While the Louisiana Supreme Court has not passed on these arguments, other courts have unanimously rejected constitutional attacks on similar commercial bribery statutes. *See State v. Brewer*, 258 N.C. 533, 129 S.E.2d 262 (1963), *app. dismissed*, 375 U.S. 9, 84 S.Ct. 72, 11 L.Ed.2d 40 (1963); *People v. Nankervis*, 330 Mich. 17, 46 N.W.2d 592 (1951); *People v. Davis*, 33 N.Y.Cr.R. 460, 160 N.Y.S. 769 (1915); Annotation, Validity and Construction of Statutes Punishing Commercial Bribery, 1 A.L.R.3d 1350, 1357–59. Since the Louisiana Commercial Bribery Statute prohibits behavior about which "men of common intelligence" need not guess, the statute is not unconstitutionally vague. *Zwickler v. Koota*, 389 U.S. 241, 249, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 367, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Furthermore, the instant scheme was so far within the core meaning of the statute, we need not consider whether the statute is overly broad.

III.

The appellants contend that the interstate nexus supplied by their use of in-

15. We will not discuss the use of interstate facilities charged in Counts Five and Six since only Levy and LaFont were convicted under these counts.

16. We note that the Seventh Circuit in *Altobella* and *Isaacs* has read the Travel Act more narrowly than the Fourth Circuit in *United*

terstate facilities was isolated, minimal, inconsequential, and nonessential to the commercial bribery scheme and insufficient to establish jurisdiction under the Travel Act.

The indictment charged in Count Two that the appellants used interstate facilities to promote their commercial bribery scheme when Willis, on the instructions of Levy, LaFont, and Perrin, called Gravity Map Service in Richmond, Texas, in order to purchase corresponding gravity maps for the stolen seismic data. Gravity Map Service, sent appropriate order forms to Willis via interstate bus. Count Three of the indictment charged that David Levy made a second interstate phone call to Gravity Map Service in Texas for the purpose of ordering corresponding gravity maps.[15]

The appellants point to *United States v. Altobella*, 442 F.2d 310 (7 Cir. 1971) and *United States v. Isaacs*, 493 F.2d 1124 (7 Cir. 1974), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146, in support of their contention that the interstate contacts were insufficient to establish jurisdiction under the Travel Act.[16] In *Altobella* and *Isaacs*, the Seventh Circuit held that the interstate travel of a bribery check was an insufficient interstate nexus under the Travel Act to support jurisdiction.

The government argues that in *Isaacs* and *Altobella* the interstate nature of the checks' travels was not essential to the extortion scheme while in the instant

States v. LeFaivre, 507 F.2d 1288 (4 Cir. 1974), *cert. denied*, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 762 (1975) and the Sixth Circuit in *United States v. Eisner*, 533 F.2d 987, 992 (1976). Since the precise question is not before us, we decline to express an opinion as to the correct reading.

case the obtaining of gravity maps was an essential element of the bribery scheme. The government urges that without the corresponding gravity maps, Perrin, the geologist, would have been unable to analyze the stolen data and the corporation formed to exploit the data would not have made a profit and, ultimately, the bribe to Willis could not have been paid. The appellants, in turn, hotly contest that the gravity maps were an essential part of the scheme. At one point in his brief, Perrin states, "Sight must not be lost of the fact that the gravity maps were not an essential aspect of the completed bribery scheme. Gravity maps are but one aspect of the base materials needed by Perrin or any other consulting geologist in the performance of his duties. . . ."

[7–9] We simply need not determine if the gravity maps were an essential part of the scheme. Since it is undisputed by the appellants that the gravity maps would have been used to exploit the stolen data, the requirements for jurisdiction under the Travel Act are met. There is no requirement that the use of interstate facilities be essential to the scheme: it is enough that the interstate travel or the use of interstate facilities makes easier or facilitates the unlawful activity. *Rewis v. United States*, 418 F.2d 1218, 1221 (5 Cir. 1969), *reversed on other grounds*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971); *United States v. Miller*, 379 F.2d 483, 486 (7 Cir. 1967), *cert. denied*, 389 U.S. 930, 88 S.Ct. 291, 19 L.Ed.2d 281 (1967). Levy's telephone call to Richmond, Texas was sufficient use of interstate facilities to support conviction under Count Three. Moreover, the evidence supports Travel Act jurisdiction under Count Two since the appellants directed Willis to make an interstate phone call and it is sufficient

that the appellants caused the use of interstate facilities. *United States v. Hedge*, 462 F.2d 220, 223 (5 Cir. 1972).

IV.

[10] In their next point of error, the appellants contend that even if jurisdiction under the Travel Act is appropriate, the jurisdiction was improperly manufactured by the government. The appellants rely on *United States v. Archer*, 486 F.2d 670 (2 Cir. 1973). Before we can begin any meaningful discussion of *Archer*, we need to consider the explanation given by the *Archer* court itself:

> While the Government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here. We adhere to that holding and leave the task of further line-drawing to the future.

486 F.2d 685–86.

Under this explanation it would be enough to note that in the instant case the interstate nexus alleged in Count Three of the indictment was supplied by a phone call made by appellant Levy, not a government agent.

We have decided, however, to examine the appellants' argument in a broader scope to determine if the government improperly supplied the interstate element in this prosecution. First, we cannot condemn the fact that the government informer was involved in the interstate element of the crime. *Cf. United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). Certainly,

Willis played the part of a willing co-conspirator and as such he would be expected to be involved in all aspects of the bribery scheme. This is not to say, however, that Willis at the behest of the government could unilaterally supply the interstate element to a local bribery scheme and thereby transform the bribery scheme into a Travel Act violation. For example, Willis could not at the government's direction cross the Sabine River merely to call one of the co-conspirators in New Orleans, Louisiana.

In the instant case, it is clear that the government reminded Willis to be a follower and not a leader in the scheme. Furthermore, the evidence at trial made clear that Perrin, as the consulting geologist, selected the out of state source for the gravity maps. Perrin insists that the government had pre-marked the geological directory so as to force Perrin into selecting an out of state source. The government replies that no particular supplier was pre-marked in the directory. Whatever the merits of this tangential dispute, the evidence makes clear that Perrin knew the significance of selecting an out of state source for the gravity maps and that he fully appreciated the fact that an out of state supplier was less likely to notice leasing activity in northern Louisiana.

We do not believe that the government acted improperly by artificially supplying the interstate nexus to a local crime in order to make out the elements of a Travel Act violation.

17. LaFont requested the following charge:

> If the jury finds that the use of interstate facilities in furtherance of the criminal charge was the calculated result of actions of the government and not the unprovoked actions of the defendant then in that event the jury shall find the defendant not guilty by reason of entrapment.

V.

Next, the appellants contend that the trial judge erred in not granting the appellants' requested instructions on entrapment. Traditionally, entrapment exists "when the criminal design originated with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute," *Sorrells v. United States*, 287 U.S. 435, 442, 53 S.Ct. 210, 212, 77 L.Ed. 413 (1932). *See also Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); *United States v. Russell, supra*; *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). The appellants do not complain of the trial judge's failure to give the traditional charge, nor could they since it is clear that the government did not know of the scheme until after Willis had been approached with the bribery offer. Instead, the appellants insist that they are entitled to an entrapment charge based on *United States v. Archer, supra*. In essence, the appellants want the trial judge to inform the jury to acquit the defendants if it finds that the defendants had no predisposition to use interstate facilities.[17]

[11, 12] Manifestly, the trial court is under no obligation to give such a charge.[18] Under the Travel Act, specific intent is required to violate state law. There is no requirement that the defendant either have knowledge of the use of

18. Arguably the district court opinion in *United States v. Archer*, 355 F.Supp. 981, 987 (S.D. N.Y.1972) supports the appellants' position. To the extent that it does, we specifically disapprove of that holding.

interstate facilities or specifically intend to use interstate facilities. *United States v. Doolittle*, 507 F.2d 1368, 1372, *aff'd en banc*, 518 F.2d 500 (5 Cir. 1975), *cert. denied*, 423 U.S. 1008, 96 S.Ct. 439, 46 L.Ed.2d 380 (1975); *United States v. LeFaivre*, 507 F.2d 1288, 1296 n.10 (4 Cir. 1974), *cert. denied*, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 762 (1975); *United States v. Roselli*, 432 F.2d 879 (9 Cir. 1970), *cert. denied*, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971); *United States v. Hanon*, 428 F.2d 101 (8 Cir. 1970), *cert. denied*, 402 U.S. 952, 91 S.Ct. 1608, 29 L.Ed.2d 122 (1971); *United States v. Miller*, 379 F.2d 483 (7 Cir.), *cert. denied*, 389 U.S. 930, 88 S.Ct. 291, 19 L.Ed.2d 281 (1967). *But see United States v. Prince*, 529 F.2d 1108 (6 Cir. 1976). Congress, in passing the Travel Act, determined that a predicate of federal jurisdiction is the travel in interstate or foreign commerce or the use of interstate facilities. *United States v. LeFaivre, supra*. Consequently, there is no necessity that the jury be informed that the defendants must intend to use interstate facilities. It is enough for the jury to determine, under a substantive Travel Act charge, that the defendants, in fact, used interstate facilities. The defendants' argument that the government improperly obtained jurisdiction is for the court to determine as a matter of law, as we have done in Section IV, *supra*.

In *Archer*, Judge Friendly distinguished between the court's holding regarding the improper manufacture of jurisdiction and the function of the entrapment charge: [19]

19. Related to the improper manufacture of jurisdiction is the power of a federal court to dismiss prosecution because of impermissible government involvement in the enterprise. This is the question not reached by the *Archer*

It is not a sufficient answer that if the issue here were simply one of entrapment, the jury would have been justified in finding, under the entirely correct instruction on the subject given by the judge, that Klein had a propensity for crime, requiring no encouragement from the federal agents. Our holding is rather that when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present.

486 F.2d at 682.

VI.

[13] Finally, Perrin contends that the trial court erred by refusing to sever the trial of defendant Perrin from the trial of the other defendants. Using *Bird v. Wainwright*, 428 F.2d 1017 (5 Cir. 1970) and *United States v. Martinez*, 486 F.2d 15 (5 Cir. 1972) as our guide, it becomes apparent that Perrin proffered no evidence that was denied admission into evidence because of the joint nature of the trial. Furthermore, Perrin is not entitled to a separate trial just because he wishes to comment on the failure of the other defendants to testify. *Gurleski v. United States*, 405 F.2d 253 (5 Cir. 1968).

Court, *id.* at 676, but the Supreme Court in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), has explicitly held that this inquiry is not a part of the entrapment question.

VII.

We have examined the appellants' remaining contentions and have found them unworthy of comment. We therefore conclude that the appellants were properly convicted and their convictions must be affirmed.

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, dissenting:

Sound public policy might induce Congress to proscribe corruption of private persons in the Travel Act. In my view, however, it has not yet seen fit to do so. Therefore, I respectfully dissent.

One of the classic limitations in the enforcement of criminal law, which is embedded implicitly in the Due Process Clause of the Constitution, is summed up in the phrase, "Nulla poena sine lege"—there should be no punishment without prior statutory mandate. My brethren require four pages of dialectic to determine that the unadorned word "bribery" in the Travel Act provides authority for the punishment by the Federal Government of "commercial bribery." The layman would scarcely choose so uncertain a route to define a clear proscription, nor indeed would the Second Circuit, *United States v. Brecht*, 2 Cir. 1976, 540 F.2d 45, *cert. denied*, 1977, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573.

We cannot truly ascribe to Congress any intention either to include or exclude commercial corruption; Congress did not deal with the problem. As one scholar has said:

> The difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the

> judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.[1]

We are thus in the position, in resolving this case, of deciding what Congress would have done had it debated the appropriate scope of the Travel Act with regard to commercial corruption.

My brethren find these footprints to guide them on the trail of meaning: first, common experience teaches us that organized crime may attempt to corrupt private citizens; second, Congress, in other statutes, has proscribed bribery of persons who are not public officials; third, the Supreme Court, in *United States v. Nardello*, 1969, 393 U.S. 286, 89 S.Ct. 534, 21 L.Ed.2d 487, refused to limit the word "extortion" to its common law meaning and defined it to include blackmail.

With deference, I must say that much of this seems to me to constitute reasoning backward from the result desired. That common experience teaches us the breadth of organized crime is not a *reason* to say that Congress *did* include commercial corruption in the word "bribery," although it may well someday prove ample reason for a legislator to decide to do so. Indeed, what "our common experience" teaches us as judges about organized crime, I do not know; I know nothing about it that may be noticed judicially. Federal Rules of Evidence, Rule 201. Moreover, whatever common experience has taught judges in this regard is, in any event, presumably known also by legislators. We thus return to the question why, in the face of such experience, did Congress not proscribe commercial bribery specifically. That inquiry is all the more troublesome because, as the majority notes, Congress elsewhere saw fit to proscribe specifically, and not generically, forms of bribery that go beyond the offense as known at common law.

1. Gray, Nature and Sources of the Law: Statutes 173 (1921 ed.).

Let me place a few grains on the side of the scale counterbalancing the arguments used by my brethren.[2] As set forth in *United States v. Brecht, supra*, only 13 states had commercial bribery statutes in 1960, the year before the Travel Act was enacted. *United States v. Brecht, supra*, 540 F.2d at 48. At least six states, as recently as 1976, did not even mention the word "bribery" in defining the offense now commonly called commercial bribery. *Id.* at 49, note 6. In Louisiana, as in New York and most other states that proscribe commercial bribery, the offense prohibited is a misdemeanor. It is punishable in Louisiana by a maximum of imprisonment for six months and a fine of no more than $500, or both. LSA–R.S. 14:73. Because of the majority's holding, the added element of interstate travel escalates commercial bribery to a federal crime, and to a felony punishable by imprisonment for up to five years and

2. The Report of the Committee on the Judiciary, United States Senate, to accompany S. 1437, the proposed new federal criminal code, S.R. 95-605, 95th Cong., 2d Sess. (1977), at 388, interprets the present bribery law as contemplating "the violation of the public servant's duty." It later states, seeming to make ambiguous what was clear, that the bribe itself is a "*quid pro quo* for the violation of an official or *legal* duty." *Id.* (Emphasis supplied.) Assuming that an expansive reading of this interpretation correctly construes 18 U.S.C. § 1952, the Travel Act would still appear to be aimed at a narrower range of conduct than is reached by Louisiana's commercial bribery statute; under the wording of the state statute, *see* Memorandum Opinion at 7111, note 3, *supra*, it is not an element of the of-

a fine of up to $10,000, or both. 18 U.S.C. § 1952(a).[3]

None of these factors is conclusive. Together, however, they weigh enough at least to balance, and, in my opinion, to tilt the scales to the other side. I would not read a criminal statute whose meaning is so ambiguous as justifying the interpretation placed on it by the majority and our colleagues of the Fourth Circuit.

Some passing reference to the factual context of this case may be appropriate in conclusion: the fish the Government caught in this Travel Act net were small fry. Its plan was to land a person who is reputed to be a criminal shark. Without reciting the facts in detail, it is evident that his possible involvement was scent to the F.B.I. The target refused the bait offered him by Willis, Perrin, Levy, and LaFont. Each of them, if guilty of anything, can be prosecuted under state law. I would leave them and the record of the trial to state authorities; I would leave to Congress the amendment of the statute to make the mesh of the net smaller if it seeks to catch the commercially corrupt in the future.

fense that the bribe-giver seek a violation of the bribe-taker's legal duties.

3. The offenses proscribed by the Pennsylvania blackmail statutes involved in *United States v. Nardello, supra*, Act of June 24, 1939, Pub.L. 872, §§ 802, 803 (current version at 18 Pa.C.S.A. §§ 3923(a)(2) and (a)(3)), are punishable under current law by two years of imprisonment, 18 Pa.C.S.A. §§ 106(d) and 1104(2), the same maximum state penalty for political bribery, Act of June 24, 1939, Pub.L. 872, § 4318 (current version at 18 Pa.C.S.A. § 4702), unless the offender threatens "to commit a crime" or makes a threat "with intent to influence a judicial or administrative proceeding," 18 Pa.C.S.A. § 4702(c), in which case the maximum penalty is seven years of imprisonment, 18 Pa.C.S.A. § 1103(3).

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

November 15, 1978

TO ALL PARTIES LISTED BELOW:

NO. 76-3926 — U.S.A. vs. VINCENT R. PERRIN, JR., DAVID L. LEVY, and DUFFY J. LA FONT, JR.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Apellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Sally Hayward

Deputy Clerk

cc: Mr. Perrin C. Butler
Mr. John T. Mulvehill
Mr. Henry L. Klein
Mr. Russell Schonekas
Mr. K. Eric Gisleson

APPENDIX C

LEGISLATIVE HISTORY OF THE TRAVEL ACT

Quoted excerpts of Hearings before the Senate Judiciary Committee, 87th Congress, First Session (S. 1653 and H.R. 6572) June 6, 19, 20, 21 and 26, 1961.[1]

Page 1

STATEMENT OF HON. ROBERT F. KENNEDY
ATTORNEY GENERAL OF THE UNITED STATES

MR. KENNEDY:

Mr. Chairman, I appreciate this opportunity to discuss legislation which we have proposed and which we believe is essential if effective action is to be taken against organized crime.

On the 17th of May, I testified before the House Committee on the Judiciary in support of six of the proposals which are before you today. In addition, this committee has before it S. 1658 to amend the Slot Machine Act. I would like at this time to submit for the record my testimony before the House committee . . .

> Mr. Chairman, I am here today supporting proposed legislation which we believe can be extremely effective in combatting organized crime and racketeering. These proposals have been developed in the Department over a period of time to aid and assist local law enforcement officers in controlling hoodlums and racketeers, who have become so rich and so powerful that they have outgrown local authorities . . .

1. Every statement contained in this entire appendix is quoted verbatim from the hearings. To save time of the typist, quotation marks have been omitted. In any instance where the person making the statement quotes from another source, the quoted source will appear in this appendix as quotes rather than inner quotes. Counsel has supplied all emphasis by italicizing. In the interest of brevity of typing, the term (emphasis supplied) does not appear on each occasion emphasis was supplied.

Page 2

As has been pointed out so often, gambling, liquor violations, narcotics, bribery, and *corruption of local officials* and labor racketeering and extortion go hand in hand . . .

Our package of bills is designed to prohibit the use of interstate facilities for the conduct of the many unlawful enterprises which make up organized crime today . . .

From huge gambling profits flow the funds to bankroll the other illegal activities I have mentioned including the *bribery of local officials* . . .

A brief explanation of the method by which the funds are obtained by the bigtime gambling operator may be useful at this time.

Many persons think of the corner handbook operator or the neighborhood merchant, who sells a numbers ticket to him, as the person to whom we refer when we talk of the gambling racketeer. This is about as accurate as describing an iceberg as a section of ice floating on top of the water . . .

Page 3

On the surface is the handbook operator. However, he is not a man of unlimited resources. He must balance his books so that he will lose no more on the winner than has been bet on the other horses in a race, after his percentage has been deducted. Therefore he

must reinsure himself on the race in much the same fashion that casualty insurance companies reinsure a risk that is too great for it to assume alone. To do this the bookmaker uses the "layoff" man, who for a commission, accepts the excess wager.

The local layoff bettor also will have limited funds and his layoff bets may be out of balance. When this occurs he calls the large layoff bettors, who because of their funds, can spread the larger risk. These persons are gamblers who comprise a nationwide syndicate or combine. They are in close touch with each other all the time and they distribute the bets among themselves so that an overall balance is reached on any horserace . . .

One of the largest operators in the combine does a layoff business of $18 million a year . . .

The term "gambler" is a misnomer for these persons. They accept money that the small gamblers wager but they do not gamble at all. This is further illustrated graphically by what we know as the numbers racket . . .

Some notorious individuals, whose names you would immediately recognize, had interests in a numbers bank but lived in a resort town far from the scene of operation. Every month a messenger carried the profits of the numbers racket from the scene of operations to the resort town. One of the payments was in excess of $250,000. Thus, the persons reaping the profit from the illegal activity remained

beyond the reach of the law enforcement officials at the place of operation and committed no crime in the State where they lived.

If our bill is enacted we will be able to prosecute the courier who carries the funds across States lines and in conjunction with the aiding and abetting statute (18 U.S.C.2) we will be able to prosecute the person who caused the courier to travel — the kingpin . . .

Page 4

These people can conduct their businesses by telephone. When local authorities get close to them, they merely pickup stakes and move to another jurisdiction. The best example of this moving to frustrate local police, is the case of a man who started operations as a layoff man in the Midwest in 1946. He moved to another town in 1949 and then to Newport, Ky., in 1950. In 1952, under pressure of the Kefauver investigations into organized crime, he moved to Montreal, Canada. When the Royal Canadian Mounted Police raided his establishment he moved back to Newport, Ky.

We can follow these people from State to State and prosecute them for the very activities which now make a mockery of local law enforcement if this travel bill is enacted . . .

Another example of the type of situation which we are trying to curb in proscribing the interstate travel in furtherance of an unlawful activity is the situation which arose in Hot

Springs, Ark., in 1960. A printing company in Jefferson Parish, La., receives race wire information from Chicago bookmakers and disseminates the data to gambling establishments in sections of the South and Southwest. The company is owned by a racketeer, since deported, and his race service manager of New Orleans. The manager, while in Hot Springs in March of 1960 got into a violent argument with the owner of the race wire service there. The Hot Springs man told the New Orleans man to stay in New Orleans as he could operate his business without help.

In May of 1960, the owner of the Hot Springs service traveled to Chicago and visited a Chicago rackets overload. The Hot Springs man sought assistance in curtailing the activities of the New Orleans group in seeking to take over his race wire service. If we could show the existence of race wire services in New Orleans and Hot Springs and the travel on the part of the New Orleans man to expand the New Orleans service and the travel of the Hot Springs man to protect his interest in the Hot Springs service we could prosecute both of these top racketeers with the enactment of the proposed bill . . .

Page 5

We have *skirted the area of social gambling by limiting the proposed statute* to *gambling, as a business,* which violates State or Federal law. In this limited aspect, the enactment of the bill will be a tremendous tool for stamping out the vicious and dangerous criminal combinations.

Mr. Chairman, this bill is vital. We need it. Local law enforment officials need it. The country needs it . . .

Page 10

Mr. Chairman, in conclusion, I would like to read into the record, the comments of Mr. J. Edgar Hoover, director of the FBI, about the bills I have discussed. Mr. Hoover's statement is as follows:

"One of the most deeply entrenched segments of crime is represented in the underworld activities of racketeers and professional hoodlums. I refer to the *vice barons*, those engaged in illegal gambling, commercialized prostitution, and illicit liquor operations as well as the narcotics peddlers and the strongarm racketeers whose lucrative illicit profits are derived from every stratum of our society. Many of these racketeers utilize interstate facilities and operate with impunity, if not in open defiance." . . .

Page 11

MR. KENNEDY:

Before the House committee I testified about the bills in some detail and I discussed them separately. I told the House committee that our investigation of the extent to which organized crime and racketeering have developed on an interstate basis convincingly demonstrated the need for new Federal laws. I cited several examples of how hoodlums and racketeers were able to operate beyond the reach of local authorities and

reap millions of dollars in illegal profits — using these profits to cheat honest Americans, *corrupt officials*, and corrode our national strength . . .

The need for action is clear and the question is what should be done and what can be done effectively *to control these hoodlums and racketeers who have become so rich and so powerful.*

These people use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. *If we could curtail their use of interstate communications and facilities,* we could *inflict a telling blow to their operations.* We could cut them down to size.

Mr. Chairman, our legislation is *mainly* concerned with effectively curtailing *gambling operations* . . .

It is very important that everyone realize that the Federal Government has a responsibility to use its interstate power or its taxing power to move against organized crime. Such crimes as gambling, prostitution, bribery, and *corruption of local officials* have been handled primarily by local authorities . . .

I wish to emphasize, Mr. Chairman, that we do not seek to preempt the field of enforcement or interfere in any way with the traditional responsibilities of local law enforcement . . .

It is essential in getting action against organized crime, which is so well organized and so well entrenched on a multistate basis that local law enforcement often is virtually powerless to act without aid and assistance of the Federal Government . . .

Page 15

Mr. Chairman, we have one more bill, S.1653, which is perhaps the most controversial and certainly one of the most important. We are seeking to take *effective* action *against the racketeer* who *conducts* an *unlawful business, but lives far from the scene in comfort and safety,* as well as against other hoodlums.

Let me say from the outset that we do not seek or intend to impede the travel of anyone *except persons engaged in illegal businesses* as spelled out in the bill. We specifically have outlined the illicit operations we seek to curtail as those involving gambling, liquor, narcotics, prostitution businesses or *extortion* or *bribery* in violation of State or Federal law.

The *target clearly is organized crime.* The travel that would be banned is travel *"in furtherance of a business enterprise" which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery. Obviously,* we are *not trying to curtail the sporadic, casual involvement in these offices,* but rather a *continuous* course of *conduct sufficient for it to be termed a business enterprise...*

Page 17

The racketeers and hoodlums in organized crime are becoming more powerful, more wealthy, and more menacing...Our purpose primarily is to prevent transmission of gambling information and equipment in interstate commerce; *prevent travel in support of "business enterprises"* involving gambling, liquor, narcotics, prostitution, or travel involving extortion or bribery and to give the FBI more tools to aid their fellow law enforcement officers.

American citizens who are *not* connected with *organized gambling* and *organized crime* have *nothing to fear* from these bills. *The only toes tread on here are those of the racketeers and hoodlums...*

Page 49

SUPPLEMENTARY STATEMENT OF AMERICAN CIVIL LIBERTIES UNION ON ANTI-RACKETEERING BILLS

Page 50

S.1653 AND H.R. 6572

Underlying the bill, we believe, is the same theory frequently invoked to justify the ever-increasing use by prosecutors of the doctrine of conspiracy. That theory states that if an individual cannot successfully be prosecuted for a substantive offense, he can perhaps be caught in the "elastic, sprawling, and pervasive offense of conspiracy" (Krulewitch v. United States, 335 U.S. 440, 445 (Jackson, J., concurring). Here, likewise, the bill implies that municipal and State law enforcement agencies are unable successfully to prosecute persons engaged in *organized racketeering* but that the Federal Government will be able successfully to prosecute the same individuals for acts in furtherance of thier "unlawful activity" if they engage in interstate or foreign commerce in the process...

As we read the proposed legislation, its principal elements are twofold: (1) *intent to perform* one of the enumerated acts in furtherance of an "unlawful activity," and (2) the act of traveling in interstate or foreign commerce *under the influence of the requisite intent*. . .

Page 62

STATEMENT OF RUFUS KING, ACCOMPANIED BY DOWNEY RICE, OF THE FIRM OF RICE & KING, ATTORNEYS AT LAW, WASHINGTON, D.C. APPEARING ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Page 63

I can state unqualifiedly that the association and our section will be very interested in, and will stay very close to, these measures, and will do everything we can do to support the general purposes of the Attorney General.

SENATOR KEFAUVER:

That is a very welcome support, of course. The American Bar Association has a diligent committee in this field. . .

Page 67

SENATOR KEFAUVER:

What you have said is in S. 1643, they attempt to get away from or not include the social, casual gambler.

MR. KING:

In S. 1653 the same problem exists in a different way.

SENATOR KEFAUVER:

Not to include the *casual*, social traveler, such as somebody who would happen to go to Laurel, Md., to place a bet. *That is not a business enterprise.*

MR. KING:

With a criminal purpose. . .

Page 93

MR. KING:

This is a bill which attempts to outlaw travel by means of interstate commerce in connection with or in aid of certain offenses in the *organized crime category*. Several features of this bill trouble me very much.

In the first place, by centering only on travel, by centering only on use of interstate commerce for travel, you are attaching the Federal jurisdiction to perhaps one of the least important of the uses that *organized* crime makes of interstate commerce.

It follows that this measure would only be likely to catch the messenger, the go-between, the little person, the very person who is now usually amenable to local law enforcement, and not reach the big syndicate kind of operator behind him.

I have already discussed this matter of the vagueness implied in *"business enterprise," trying to impose a concept that is new to the courts,* and as far out of context as the words "business enterprise" when you are dealing with an area where by definition you are dealing with crime to begin with. *You are going to try to separate within criminal activities criminal activities which are a business enterprise from* criminal activities which are *individual* undertakings.

SENATOR KEFAUVER:

Mr. King, the Attorney General in his statement said the aiding and abetting statute would get the big fellows who did not cross the State lines who remained back in the State and sent out their runners across the State lines, under aiding and abetting.

MR. KING:

If you could prove the relation once more removed, with the difficulties of *"intent"* and *"knowingly,"* and if you could then prove a direct causative relationship between the messenger and the man whose business he was on — but actually that is my next point.

The burden of proving, the difficulty of proving, this specific intent, and the difficulties of tying anyone to a physical act like traveling across a State line by means of showing intent to *further a criminal business enterprise, seem to me very hard to surmount.*

SENATOR KEATING:

Furthermore, it is limited to *four business enterprises, gambling, liquor, narcotics, and prostitution.*

MR. KING:

Those are in the *Organized crime categories.* They fairly well cover the field of things where we believe, anyway, that the crime syndicates are operating . . .

Page 103

STATEMENT OF HERBERT MILLER, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

SENATOR KEFAUVER:

What are you trying to do through this bill?

MR. MILLER:

This bill is designed to deny to people engaged in a particular type of conduct the right to travel in interstate commerce to further that type of conduct. The bill itself prohibits the travel in interstate commerce to aid or further what is defined as an unlawful business, *unlawful activity which is a business enterprise* involving *gambling, liquor, narcotics, or prostitution,* which are in violation of the laws of the State or of the Federal Government.

The first proviso covering distribution of the proceeds of any unlawful activity is quite clear, I believe. It is aimed at the man who travels around the country with substantial sums of cash, in effect *balancing the books of the layoff bettors throughout the country.*

SENATOR KEFAUVER:

He is just the agent. Would this aiding and abetting principle apply where he is working?

MR. MILLER:

It would, indeed, Senator.

SENATOR KEFAUVER:

The principal is in say Tennessee and he sends an agent out to Kentucky, Michigan, and New York to distribute money, the aiding and abetting statute would get the man's principal in Tennessee?

MR. MILLER:

That is our construction, sir. As the matter now stands, even if we know that a man is taking off in an airplane to go into another jurisdiction with a substantial amount of money, there is nothing we can do about it . . .

Page 105

SENATOR KEFAUVER:

The next question is, sir, *What is a crime of violence?* Does violence have a legal definition so that you could really tell what you were legislating against in subsection (2)?

MR. MILLER:

A crime of violence, I don't know that it would have a

legal definition, but it certainly would be easily definable, because *it would involve a crime wherein the person was injured, the person of* another party was injured, a crime of violence.

SENATOR KEFAUVER:

I know, but the man comes to the District of Columbia for the purpose of punching a guy in the nose. He doesn't do it, but that is what he came here for. Would that be a crime of violence?

MR. MILLER:

The *punching of a man* in the nose, an assault, *would be a crime of violence, yes.*

SENATOR KEFAUVER:

But he doesn't do it.

MR. MILLER:

If he didn't do it, frankly we would have a very difficult burden of proof under this bill. Senator, the way this bill is set up, and you have asked as a matter of fact a great and classic question that always comes up when this bill is discussed. Two men get together in New York and they decide that they are going to Washington, D.C., *to commit a crime of violence in furtherance of an unlawful business* enterprise. They agree they are going to do it. They tell several people they are going to do it. They get on the airplane and they fly to Washington, D.C.

They get to Washington, D.C., and they decide "Well, gee, we had better not do this, we are going to get in trouble." They get off the plane, they get on another plane and they fly back to New York, which is I think just exactly the question you asked. Would they at that stage of the game have violated that statute?

I would say, Senator, even assuming that they had violated the statute, we would have a very difficult time ever making a case out under this particular provision, because as a practical matter, in order for us to prove a case that will stand up in court, in practically every instance in proving the intent to travel in interstate commerce to do these certain things, *we are going to have to demonstrate that he actually performed some act* when he arrived at this destination in another jurisdiction . . .

Page 106

SENATOR KEFAUVER:

Sir, subsection 3—

> otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, and carrying on of any unlawful activity.

I asked Mr. Kirby to look up the word "facilitate" in Webster's Dictionary and he reports that it means "to make easy, lessen the labor of."

Isn't that a pretty broad word? Would it apply to a horse owner who is transporting a race horse across a State line, or to a sports writer who is going across a State line to report a boxing match? Would not that

facilitate, or make easier, some unlawful activity, because if the horse didn't get there, there wouldn't be any race and gambling?

If the sports writer didn't give the information or his opinion, or if a sports writer gave his opinion about how some race was going to come off, that might make betting easier back somewhere.

MR. MILLER:

Senator, there is no question that subsection 3 is very broad, and it was made so broad designedly.

There is a substantial burden that the Government would have to undertake under this statute in order to prove a case. The reason is this.

We would have to prove first of all that there did exist a business enterprise involving gambling, liquor, narcotics, or prostitution, and further that the business was in violation of law, State or Federal . . .

Thus, we have attempted to limit this bill to the concept of *business activity* which we will have to prove, and further, then we say that once a man has traveled in interstate commerce and any steps that he takes in the State of his destination to further this business which is unlawful should be prohibited, and that is what we have attempted to do . . .

Page 107

SENATOR KEFAUVER:

Mr. Miller, you say that this only applies to things

where there is a business undertaking:

MR. MILLER:

I beg your pardon, with another exception, extortion or bribery.

SENATOR KEFAUVER:

The definition of "unlawful activities" is where you get that business limitation.

MR. MILLER:

Yes, sir; in subsection (b).

SENATOR KEFAUVER:

Why do you limit it to crimes in furtherance of a business activity? A person who comes from New York to the District of Columbia to commit murder, to rape, why don't you make him guilty?

MR. MILLER:

The reason for that is, Senator, that *we were attempting to limit the scope of this statute to certain types of business that we know are allied with organized crime.*

Now I grant you that there is no reason why it should be permissible for a man to travel in interstate commerce in order to commit murder, but one of the reasons why we did not include and encompass travel in interstate commerce to violate any statute, State or Federal, was an attempt to limit it to the ones we are actually trying to control, and that is *why we limited it to the four types of businesses which are* specified in subsection (b).

SENATOR KEFAUVER:

You have read a lot about Murder, Inc., in connection with Maffia activities in New York and New Jersey.

SENATOR KEATING:

The use of the word "Maffia" is very unfortunate.

SENATOR KEFAUVER:

I'll say Murder, Inc., then. And a person comes to the District of Columbia for the purpose of committing a murder, that would not be encompassed in this bill.

MR. MILLER:

Not unless he was committing the murder to further the unlawful business enterprise.

SENATOR KEFAUVER:
One of these four unlawful business enterprises.

MR. MILLER:
Yes.

SENATOR KEATING:

But if there was travel to commit murder, and the murder itself was for hire, *but it didn't have a connection with these four offenses, it would not be covered under this statute.*

MR. MILLER:

That is correct. We limit crime or violence to the furtherance of any unlawful activities, and as I say, Senator, the reason we did this is because we knew that there would be possibly some criticism of this bill as being rather broad, and we thought it would be a better bill from the standpoint of Congress *if we could limit it to these four types of enterprises, rather than,* in effect, enact or *ask Congress to enact a general statute* which would, in effect, *make any travel in interstate* commerce with intent to violate *any law, State or Federal,* violation of a Federal statute.

That is why the bill is indeed limited.

Now I can certainly sit here and agree with you, gentlemen, that a group of *conspirators* such as Murder, Inc., that Senator Keating referred to, if they travel in interstate commerce to commit murder, certainly that is something that is repugnant, and perhaps *should be made* a Federal crime.

But as I say, that was excised, *that concept was excised from this statute in order to permit a limited area in which interstate travel* would be *prohibited.*

Page 108

MR. MILLER:

Senator, there are really two concepts, I think, behind the fugitive felon statute, and the travel bill. The travel bill is *specifically* aimed at *organized crime* and that is why it was limited to the four types referred to . . .

Page 109

MR. MILLER:

Basically, what it would give us is this. Let me take a situation that now exists in the Middle West.

Racketeers have moved in, and they have in effect taken over the police force, and, if you will, the municipal government of the particular town. The place has been thoroughly corrupted. The State perhaps does not have adequate legal tools to cope with the situation.

At the present time *there is a good deal of travel* back and forth by the persons who have taken over this town in *interstate commerce,* and they do it to further the business they have built up there and to establish new businesses.

If we could show that they had traveled in interstate commerce, and that they had done so to *further this business in this town of* gambling, which is the fact that I am relating to you, that the gamblers in effect have taken over, you then would prove a violation, a *business operating* in violation of a State law; *and if you could show travel in furtherance of that business,* unlawful under State law, then the Federal Government would have investigative and prosecutive jurisdiction to step in and give aid and assistance in cleaning up that particular situation . . .

Page 111

MR. MILLER:

There are some who would feel, I think, perhaps, that

if you put one more criminal violation in, you are going too far. And in S. 1653, *we tried to tailor-make it,* so to speak, *to cover the people* that we are trying to get, namely *those engaged in organized* crime . . .

Page 113

SENATOR KEATING:

Or would you object to broadening it — you probably would object to broadening it — to include frauds generally, wouldn't you? . . .

MR. MILLER:

I would have one field of hesitancy, Senator, in broadening it, for this reason:

This *bill* as it now stands is *really aimed at what we call organized crime* today. When you get off into the field of criminal fraud and false pretenses, there is a rather substantial expansion of the crimes committed, because these crimes would be those which either violated the laws of the United States or State laws, and I frankly would not want to expand our jurisdiction to the point where we were overcommitted from an investigative and prosecutive standpoint, and where the line is, I am sure I don't know, but if we add certain additional offense, then you increase the scope of the investigation, and, of course, subsequent prosecution by the Federal Government.

Now, fraud as a practical matter is not normally the type of crime that you associate with organized crime. They make their money in gambling and in the other

things listed here, which you, I suppose generally could call a fraud on the public, in view of the odds they give . . .

Page 255

SENATOR ERVIN:

You contend that all gambling is a business enterprise.

MR. MILLER:

I do *not* contend that all gambling is a business enterprise.

SENATOR ERVIN:

A lot of people like to play poker just for social ability. If two or three members of the Department of Justice or two or three Senators were to cross the Potomac River for the purpose of engaging in a little poker game over in Alexandria—

SENATOR KEATING:

That could happen.

SENATOR ERVIN:

Could they be prosecuted for this?

MR. MILLER:

Senator, we would never prosecute—

SENATOR ERVIN:

That is not the question. *That is why I object* to bills of this kind. *I think that the law ought to treat all people alike* in like circumstances.

Now, if you want a bill to reach a gambling syndicate, that is in the business of gambling, you ought to draw a bill to reach that syndicate and not, for example, folks who want to play a little social game of poker.

Now, I do not play poker because I tried it many years ago and found out I did not have enough financial resources to pay the tuition fees, and I quit.

MR. MILLER:

Senator, if you will look at the definition of "unlawful activity," you will find that we use the term *"business enterprise:* in an attempt to get away from the very situation that you referred to.

We wanted to get the concept in of an *organized, going business.*

Now, you have the same concept today under the wagering stamp tax or the excise tax where, if a man is engaged in business, he is required to purchase an occupational gambling stamp.

And it was that same concept that we wanted to enforce here so that the poker party, as you say, which travels from the District to Virginia would not be covered.

SENATOR ERVIN:

Do you think that a man who engages in a crap game or a poker game for the purpose of supplementing his income is not engaged in the business of crime?

MR. MILLER:

The way you put it, *I could safely answer "No".* It would have to depend on the facts.

In other words, if three people get together for a friendly game of craps, if I may use the term, they are all independent of one another and they are all fighting one another because they are all attempting to win what is in the center of the carpet.

But where you have, as we had out in Loudoun County, a numbers operation which made substantial amounts of money in the District, and they take the proceeds and keep this business over in Virginia where they do not do any gambling, all the gambling being done in the District of Columbia, then I say, sir, yes, that is a *business enterprise.*

Page 256

You have got 25 to 50 people tied up in it, and this is a flow across the State lines, which I think Congress should prohibit.

The District of Columbia police cannot run out into Loudoun County.

SENATOR ERVIN:

Would not any person, who might not have any connection whatever with that business, who merely goes out to gamble, be engaged in a business and therefore be guilty?. . .

MR. MILLER:

NO.

Page 261

SENATOR CARROLL:

Once you open the door — and I am not saying we should not do it, but I think we ought to understand what we are doing — once we open the door in here there is no reason why we cannot legislate in any area affecting interstate commerce.

You are dealing in this bill with the people who make gambling, narcotics, prostitution, that sort of a thing; but this concept could be *broadened* across the board to any crime.

MR. MILLER:

It could be, yes. It could be broadened to any crime. Frankly, *that is why we limited it to the four* where we felt that there was a serious problem.

SENATOR CARROLL:

I am not only thinking, Mr. Miller, of today's necessity; I am looking into the future 2 years, 4 years, 10 years.

MR. MILLER:

Unquestionably, conceivably in the future, again I assume a need would be shown, *this concept could be expanded*. . .

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-959

VINCENT R. PERRIN, JR.
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Certiorari Filed: December 15, 1978
Certiorari Granted: March 19, 1979

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78 - 959

VINCENT R. PERRIN, JR.
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED: DECEMBER 15,1978
CERTIORARI GRANTED: MARCH 19, 1979

In accordance with designation of Record for Appendix herein filed on April 17, 1979, Petitioner Vincent R. Perrin, Jr. through undersigned counsel designates as Appendix to accompany Original Brief on the Merits, as follows:

1. Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed in the Supreme Court of the United States December 15, 1978.

2. Opinion and order, including dissent of the Honorable Alvin B. Rubin, Circuit Judge, appearing on pages A-1 through A-22 of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit herein filed, reported 580 F. 2d 730.

3. Notice of order dated November 15, 1978 denying Petitioner Vincent R. Perrin, Jr.'s petition for rehearing in the United States Court of Appeals, Fifth Circuit appearing at pages A-23 and A-24 of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

4. Legislative history of the Travel Act appearing at pages A-25 through A-51 of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

5. In accordance with the requirement contained in Rule 36(1) of the Honorable Supreme Court of the United States Petitioner Vincent R. Perrin, Jr. adopts the following relevant docket entries relevant pleadings, and parts of the record to which

Petitioner Vincent R. Perrin, Jr. wishes to direct this Honorable Court's attention, herein designated as Chronology and Course of Proceedings and Disposition in the Lower Courts.

CHRONOLOGY AND COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER COURTS

1. *Dates and Synopsis of Proceedings on Record in the United States District Court for the Eastern District of Louisiana.*

June 1, 1975 - Roger Willis becomes government informer. S-31 (See Tr. Vol. 16, pp. 1444, 1457)

July 10, 1975 - Defendant LaFont and one Richard Nugent approach Willis to remove geophysical data from Petty-Ray's New Orleans Office. (Indictment,Tr. Vol.1)

July 16, 1975 - Willis steals and removes alleged seismic data from Petty-Ray and delivers same to LaFont (Indictment Tr. Vol. 1; Tr. Vol. 14, pp. 799-800; Appendix p. 39)

July 18, 1975 - Nugent is removed from alleged conspiracy by LaFont (Tr. Vol. 11, pp. 555, 556)

July 18, 1975 - Willis, LaFont, and Levy form Conspiracy No. 2 (Tr. Vol. 11, p. 556)

July 24, 1975 - Defendant Perrin meets for the first time Levy and LaFont in Levy's office, then lunches with Levy, LaFont, and Willis at the Faux Pas. Perrin meets Willis for the first time.

July 30, 1975 - Willis requests of LaFont written assurance of his two percent and interest in corporation.

August 4,1975 - Willis, after telephoning Perrin to request meeting to discuss geology, meets with and entraps Perrin at International Trade Mart Building to designate interstate nexus as the source for gravity coverage, thereafter informing Perrin for the first time that the seismographic materials, which Perrin could not interpret and saw fleetingly for the first and only time on July 24, 1975, were stolen. (Vol. XV pp. 1271, 1278, Tape 6)
Willis calls Richmond Texas for interstate commerce nexus.
Willis calls LaFont (Tape 7).

August 27,1975 - Perrin learns that his client, Marcello, is not interested in further pursuing the oil program.

September 15,1975 - Discussions commence with reference to Izuel and Haddox becoming interested as investor and geologist.

December 9, 1975 - Perrin and co-defendants indicted.

December 17, 1975 - All defendants but Perrin arraigned.

July 19, 1976 through July 30, 1976 - Jury trial.

July 22, 1976 - Defendants Izuel and Haddox severed.

July 30, 1976 - Verdict handed down.

August 6, 1976 - Defendant's motions for acquittal and new trial.

September 3, 1976- Motions denied.

September 9, 1976- Government's motion and order for dismissal as to Defendants Haddox and Izuel executed and entered. (Crim. Docket 75 738G, p. 166).

September 10, 1976- Notice of appeal of Defendant Perrin filed.

September 29,1976 - Defendants Levy, LaFont, and Perrin sentenced.

2. *Proceedings in the United States Court of Appeals for the Fifth Circuit.*

1977 - Original Brief and Appendix on behalf of Vincent R. Perrin, Jr. Petitioner, filed.

January 15, 1978 - Reply Brief of Vincent R. Perrin, Jr. filed in the United States Court of Appeals for the Fifth Circuit.

September 20,1978- Opinion, decision and dissent of United States Court of Appeals for the Fifth Circuit decided.

October 24, 1978 - Petition for rehearing filed in behalf of Vincent R. Perrin, Jr., Petitioner herein.

November 15, 1978 - Date of notice of United States Court of Appeals Fifth Circuit order denying Vincent R. Perrin, Jr.'s petition for rehearing.

3. *Proceedings in the Honorable Supreme Court of the United States.*

December 15, 1978- Petition filed for Writ of Certiorari to the United States Court of Appeals Fifth Circuit.

March 19, 1979 - Certiorari granted.

April 17, 1979 - Date of Petitioner Vincent R. Perrin, Jr.'s record designation for appendix.

May 24, 1979 - Letter request by undersigned counsel for Petitioner Vincent R. Perrin, Jr., confirming telephone conversation requesting date for filing Original Brief on the Merits and Appendix be extended through and including May 31, 1979.

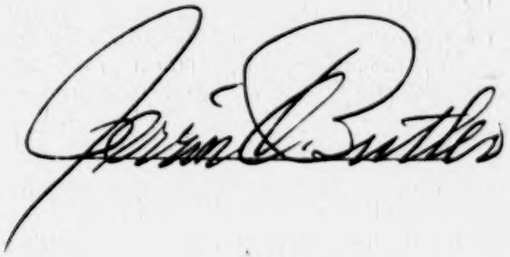
May 31, 1979 - Original Brief on the Merits and Appendix filed.

Respectfully Submitted,

Perrin C. Butler
Suite 1215
144 Elk Place Plaza
New Orleans, Louisiana 70112
Telephone: 504-581-2792
Counsel for Vincent R. Perrin, Jr.

CERTIFICATE OF SERVICE

I certify that copy of the foregoing has been served upon Wade H. McCree, Jr., Solicitor General, Philip B. Heymann, Assistant Attorney General, T. George Gilinsky and James Roland Difonzo, Attorneys, Department of Justice, Washington, D.C. 20530 by depositing same in the United States Mail, properly addressed with adequate postage this 30th day of May, 1979.



Nos. 78-5930, 78-5855, 78-959

In the Supreme Court of the United States

OCTOBER TERM, 1978

DUFFY J. LAFONT, JR., PETITIONER
v.
UNITED STATES OF AMERICA

DAVID L. LEVY, PETITIONER
v.
UNITED STATES OF AMERICA

VINCENT R. PERRIN, JR., PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

T. GEORGE GILINSKY
JAMES ROLAND DIFONZO
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5930

DUFFY J. LAFONT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-5855

DAVID L. LEVY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-959

VINCENT R. PERRIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Perrin Pet. App. A) is reported at 580 F. 2d 730.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1978. A petition for rehearing was denied on November 15, 1978. The petition for a writ of certiorari in No. 78-959 was filed on December 15, 1978, in No. 78-5855 on December 11, 1978, and in No. 78-5930 on December 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether commercial bribery in violation of state law is encompassed within the proscription of the Travel Act, 18 U.S.C. 1952.

2. Whether there was sufficient evidence to support petitioner Perrin's conviction.

3. Whether the district court properly denied petitioner Perrin's severance motion.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of conspiring and of using the facilities of interstate commerce with the intent to promote a commercial bribery scheme illegal under state law, in violation of 18 U.S.C. 1952 and 371. Petitioner Perrin received concurrent one-year suspended sentences on the conspiracy count and two substantive counts. Petitioners LaFont and Levy were sentenced to concurrent two-year terms of imprisonment on the conspiracy count and four substantive counts. The court of appeals affirmed, one judge dissenting (Perrin Pet. App. A; 580 F. 2d 730).

As summarized by the court of appeals, the evidence at trial showed that petitioner LaFont approached Roger Willis, an employee of the Petty-Ray Geophysical Company, and proposed that Willis steal certain exploration charts from his employer. Willis was to receive a

percentage of the profits of a corporation organized by petitioners Levy and LaFont to exploit the stolen data. In furtherance of this scheme, petitioner Perrin, a consulting geologist, was to interpret and analyze the data stolen from Petty-Ray. Petitioners used the facilities of interstate commerce in furtherance of the commercial bribery scheme by placing interstate telephone calls to secure materials needed to analyze the stolen exploration charts. Commercial bribery of an employee of a business firm is illegal under Louisiana law (La. Rev. Stat. Ann. § 14: 73 (West 1974)). (See Perrin Pet. App. A-5 to A-6, A-12 to A-13, A-15.)

DISCUSSION

1. Petitioners contend (Perrin Pet. 6-8; LaFont Pet. 4-7; Levy Pet. 4-7) that the court of appeals erred in holding that the Travel Act's reference to "bribery" encompasses commercial bribery illegal under state law, and that the decision below conflicts with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Brecht*, 540 F. 2d 45 (1976). Although we believe that the court of appeals correctly rejected petitioners' contention, we recognize that a direct conflict among the circuits exists on this significant issue of statutory construction and thus do not oppose the petitions for certiorari on this issue.

The federal Travel Act, 18 U.S.C. 1952, prohibits the use of any facility of interstate commerce to promote or carry on any of certain specified unlawful activities, including "bribery" in violation of the law of the state in which it is committed. In *United States* v. *Pomponio*, 511 F. 2d 953 (4th Cir.), cert. denied, 423 U.S. 874 (1975), the Fourth Circuit interpreted this language at face value, concluding that the statute covers commercial bribery

as well as bribery of public officials.[1] Thus, the court held that the Act extended to defendants' bribery of a bank officer to influence his approval of certain loans.

In *United States* v. *Brecht*, 540 F. 2d 45 (1976), the Second Circuit disagreed with *Pomponio*, holding that commercial bribery could not serve as the basis for a Travel Act violation. The Second Circuit reasoned that commercial bribery "typically is not a feature of organized crime and was not subsumed under the traditional offense of bribery." *Id.* at 50. On this ground, the Second Circuit set aside convictions based on commercial bribery illegal under New York law.[2]

The decision of the court of appeals in the present case holds that commercial bribery illegal under state law is encompassed within the federal Travel Act; it thus conflicts with the Second Circuit's holding in *Brecht*. The court below reasoned that commercial bribery could not be excluded from the Act's coverage simply because it is not "typically associated with the underworld." Such a requirement would be tantamount to implying an additional element of the statutory offense, contrary to this Court's teaching in *United States* v. *Culbert*, 435 U.S. 371 (1978). The court of appeals therefore concluded that the literal terms of the statute were properly applied to commercial bribery. The term "bribery" was thus

[1] *Pomponio* sustained the defendants' convictions based on interstate travel in furtherance of a commercial bribery scheme illegal under New York law and under a federal statute (18 U.S.C. 215) applicable to federally insured financial institutions.

[2] Following the Second Circuit's decision in *Brecht*, the defendants in *Pomponio* sought vacation of their sentences, which was denied. This Court subsequently denied review. See *Pomponio* v. *United States*, 430 U.S. 966 (1977); *Piluso* v. *United States*, No. 78-279 (Nov. 27, 1978). The government opposed certiorari in those cases because there was not yet a genuine conflict among the circuits. The *Pomponio* convictions rested on violations of federal as well as state commercial bribery statutes, while the *Brecht* convictions rested solely on state law commercial bribery violations.

construed in its generic sense rather than in a strict common law sense, an approach approved in *United States* v. *Nardello*, 393 U.S. 286, 289, 296 (1969). (Perrin Pet. App. A-8 to A-11).

While there have been relatively few Travel Act prosecutions in the past involving violations of state commercial bribery statutes, several such prosecutions have recently been brought, and other cases are under investigation. The question is thus one of significant practical impact in the administration of the statute. Accordingly, while we believe that the decision of the Fifth Circuit is correct under *Nardello* and *Culbert*, we do not oppose the granting of petitions for certiorari to resolve the conflict between the Fifth and Second Circuits.

2. Petitioner Perrin also contends (Pet 8-9) that the evidence was insufficient to sustain his conviction. However, as the court of appeals pointed out (Perrin Pet. App. A-6), petitioner did not challenge the sufficiency of the evidence on appeal, and that question was not decided by the court below. The question is therefore not appropriately raised in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, the evidence, viewed in the light most favorable to the government (*Burks* v. *United States*, No. 76-6528 (June 14, 1978), slip op. 15-16; *Glasser* v. *United State*, 315 U.S. 60, 80 (1942)), was sufficient to establish petitioner's guilt. The evidence showed that petitioner served as a consulting geologist in the illegal scheme. It was his job to interpret the stolen geological data. Petitioner Perrin caused Willis to call an out-of-state supplier in order to purchase materials needed to analyze the stolen data. He selected an out-of-state source for these materials believing that a distant supplier would be less likely to notice the illegal exploration activities of the conspirators (Perrin Pet. App. A-12, A-15).

3. Petitioner Perrin's claim (Pet. 9-10) that he was entitled to a severance because he was not a conspirator and because his defense was antagonistic to that of his co-defendants is equally unsupported. The evidence regarding Perrin's participation in the conspiracy was substantial, and, as noted, above, he did not challenge the sufficiency of that evidence in the court below. Moreover, Perrin does not specify how his defense strategy was inconsistent with that of his co-defendants, and he made no such showing in the lower courts (Perrin Pet. App. A-18). Perrin proffered no evidence at trial that was excluded due to the joinder of his co-defendants (*ibid*), and he has shown no prejudice from the joinder. This fact-bound claim does not merit review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be granted, limited to the question whether the Travel Act encompasses commercial bribery in violation of state law.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILLIP B. HEYMANN
Assistant Attorney General

T. GEORGE GILINSKY
JAMES ROLAND DIFONZO
Attorneys

FEBRUARY 1979

DOJ-1979-02

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-959

VINCENT R. PERRIN, JR.
Petitioner

versus

UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted]BRIEF ON THE MERITS

ROBERT G. HAIK
4616 Jefferson Highway
Metairie, La.
Telephone: (504) 733-2797

PERRIN C. BUTLER
Suite 1215
144 Elk Place Plaza
New Orleans, La. 70112
Telephone (504) 581-2792

Counsel for
Vincent R. Perrin, Jr.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

INDEX (Continued)

CITATIONS

CITATIONS (Continued

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78 - 959

VINCENT R. PERRIN, JR.,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMENDED ORIGINAL BRIEF ON THE MERITS IN BEHALF OF PETITIONER VINCENT R. PERRIN, JR.

Petitioner, Vincent R. Perrin, Jr., respectfully prays that this Honorable Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed judgment of conviction against Petitioner, Vincent R. Perrin, Jr., for the following reasons.

QUESTION PRESENTED

Whether "Commercial Bribery" of a private employee, defined as a misdemeanor in 14 Louisiana Revised Statutes 73, which crime, if any, was completed on July 16, 1975, is embraced within the meaning of the term "bribery" as used in the Travel Act, 18 U.S.C.A. 1952 (1976) insofar as Petitioner Vincent R. Perrin, Jr. is concerned.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 1952 (1976) provides:

"Interstate and foreign travel or transportation in aid of racketeering enterprise.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to -

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any *business enterprise* involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

As amended

Pub. 1. 91-513, Title II Sec. 701 (i)(2), Oct. 27, 1970. 84 Stat. 1282." (Emphasis supplied)

14 Louisiana Revised Statutes 73 provides:

"Commercial Bribery.

Commercial bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any *private* agent, employee, or fiduciary, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's, or fiduciary's action in relation to the principal's or employer's affairs.

The agent's,employee's, or fiduciary's acceptance of or offer to accept, directly or indirectly, anything of apparent present or prospective value under such circumstances shall also constitute commercial bribery.

Whoever commits the crime of commercial bribery shall be fined not more than five hundred dollars, or be imprisoned for not more than six months, or both."
(Emphasis supplied)

STATEMENT OF THE CASE

Petitioner Vincent R. Perrin, Jr. was convicted by a jury in the District Court for the Eastern District of Louisiana for

having violated and conspiring to violate the Travel Act, 18 U.S.C. 1952 (1976). He was charged with having used interstate facilities to undertake a commercial bribery scheme, which occurred on and prior to July 16, 1975 in violation of the Louisiana Commercial Bribery Statute, 14 La. R.S. 73. The record shows that Petitioner Vincent R. Perrin, Jr., a subsurface geologist, had been employed for the first and only time by the "criminal shark" and "target" of the federal government on July 24, 1975, at which time he saw fleetingly for the first and only time before the Grand Jury investigation, one sheet of the alleged seismographic materials which he was later told (on August 4, 1975) that said seismographic materials were "stolen".

The transcript shows that co-defendants Levy and LaFont with the knowledge of Willis, organized a corporation, Black Gold Energy Resources, Inc., specifically designed to receive profits from the exploitation of stolen seismic exploration data. No proof exists that Petitioner Perrin had any knowledge whatsoever of said corporation, that it was to receive profits, as to who participated in the theft of said "seismographic data", as to who was the employer of the private person allegedly bribed by said alleged conspirators or any other details whatsoever in connection with the prior occurring alleged theft. The jury found Petitioner Vincent R. Perrin, Jr. guilty and he was sentenced to a term of two years which was suspended while Perrin was placed on probation.

Petitioner Vincent R. Perrin, Jr. appealed his case to the Court of Appeals for the Fifth Circuit. That Court, by a divided vote, found that commercial bribery was embraced by the term "bribery" as used in the Travel Act and that, therefore, petitioner was guilty of having violated that Act. Although this was a case of first impression for the Fifth

Circuit, this question has already been presented and decided by two other Courts of Appeals, *U.S. v. Brecht*, 540 F.2d 45 (1976 2d Cir.) Cert. den. 1977, 429 U.S. 1123, 97 S.Ct. 1160, 51 L Ed (2d) 573; and *U.S. v. Pomponio*, 511 F.2d 953 (1975) 4th Cir., cert. denied 423 U.S. 874, 96 S. Ct. 142, 46 L.Ed. 2d 105. The decisions in these two cases are conflicting. The Second Circuit found that the misdemeanor offense of commercial bribery is not within the meaning of the term bribery as used in the Travel Act and the Fourth Circuit found that "bribery" as used in the Travel Act does encompass the scheme of commercial bribery.

Commercial bribery is a statutory offense commonly (as in the case at bar) classified as a misdemeanor punishable by imprisonment of not more than six months and/or a fine of not more than $500.00. It involves the bribing of private employees who are not public officials. Common law bribery involves the corruption and bribing of public officials in return for official action. The two are completely distinct crimes.

U.S. v. Pomponio, supra, a Fourth Circuit case, was the first case to deal with the issue of whether or not the term "bribery" as used in the Travel Act, 18 U.S.C. 1952(1976) encompasses the misdemeanor crime of commercial bribery. That Court held that to say that commercial bribery was not encompassed by the term "bribery" in the Travel Act would be "giving the term an unnaturally narrow reading." 511 F. 2d at 957. Therefore, the Travel Act was held to encompass the misdemeanor of commercial bribery.

The Second Circuit in a later case, however, held to the contrary. *U.S. v. Brecht, supra.* After a lengthy summary of

the legislative history of the Travel Act, excerpts of which legislative history are annexed hereto as Appendix C, and the differences set forth in New York law between bribery and commercial bribery, the Court concluded that "we see no evidence of congressional intent to bring 'commercial bribery' within the scope of the Travel Act." 540 F.2d at 50.

The Court continued:

> "The *Nardello* Court (*U.S. v. Nardello*, 393 U.S. 286 (1969) noted that the Travel Act was primarily designed to stem the clandestine flow of profits to organized crime** and gave 'shakedown rackets' and 'loansharking' as illustrations of methods used by organized crime to generate income. Id. at 295, 89 S.Ct. 534. To include 'commercial bribery' which typically is not a feature of organized crime and was not subsumed under the traditional offense of bribery, in the coverage of the Travel Act, simply because it contains the word 'bribery', would be to accept a literalism which the Court did not approve by its reasoning in *Nardello*. ***540 F.2d at 50.

It should be noted that the same differences as set forth in the *Brecht* case in the New York Law between bribery and commercial bribery exist in Louisiana law. Title 14 of the Louisiana Statutes is entitled "Bribery and Intimidation" in which is proscribed the classic bribery of a public official. In the Louisiana Statutes the above referred to misdemeanor commonly called commercial bribery is included in the subpart of Title 14 under "Offenses Against Property".

As is aptly noted in the *Brecht* case, in 1960, the year before the Travel Act was enacted, only 13 states had "Commercial Bribery" statutes and all were misdemeanors.

A majority of the hearing panel of the court below agreed with the former case, *U.S. v. Pomponio*, supra. Judge Thornberry reasoned that even though the primary impetus for the enactment of the Travel Act was to curb crimes of the underworld, it cannot be implied that only those kinds of crimes were the ones outlawed by the Travel Act. He also agreed with the *Pomponio* Court in stating that "bribery" should be used in its generic sense and not limited to its common law definition.

However in a strong dissent, Judge Alvin Rubin stated that a classic limitation on criminal law enforcement is that "there should be no punishment without prior statutory mandate." He continues harshly by saying:

> "My brethren require four pages of dialectic to determine that the unadorned word 'bribery' in the Travel Act provides authority for the punishment by the Federal Government of 'commercial bribery.' The layman would scarcely choose so uncertain a route to define a clear proscription, nor indeed would the Second Circuit, *United States v. Brecht*, 2d Cir.,1976, 540 F.2d 45, *Cert. denied*, 1977, 429 U.S. 1123, 97 S. Ct. 1160, 51 L.Ed. 2d 573." 580 F. 2d 730, at 738.

There have been a number of cases reported since 1971 which have pointed out the fact that this statute may, if not interpreted correctly, cause substantial interference in federal-state relationships. *Rewis v. U.S.*, 401 U.S. 808,91 S.Ct. 1056, 28 L.Ed. 2d 488 (1971); *U.S. v. Archer*, 486 F.

2d 670 (2nd Cir., 1973).

The leading case of *Rewis v. U.S., supra*, provides at page 812 that ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniency, your Honors further observing that in the legislative history, Congress certainly implied that "an expansive Travel Act" would alter sensitive federal-state relationships and "could over-extend limited federal police resources...and would transform relatively minor state offenses into federal felonies." (401 U.S. 808 at P. 812).

The legislative history is clear that the Travel Act was a manifestation of Attorney General Robert Kenedy's attack on organized crime. The Travel Act was clearly designed to aim at those underworld leaders who direct business enterprises involving the proscribed activities and reside in one state but carry on their illegal activities in another. (See Appendix C attached hereto; see also *U.S. v. Nardello, supra* at P. 290; and *Rewis v. U.S., supra* at P. 811).

The dissenting opinion of Circuit Judge Alvin B. Rubin correctly reflects the intention of Congress that the Travel Act should proscribe and be limited to the use of interstate facilities by vice barons, organized criminals and racketeers, in furtherance of one or more business enterprises, which business enterprises are specifically limited to gambling, liquor, narcotics, prostitution, and extortion or bribery and corruption of local public officials, and does not even include murder. (See Appendix C page 43)

Realizing that underworld criminal activity was the target of this legislation, an expansive construction of this Act

would not only place a heavy strain on federal-state relationships, but would transform traditionally local criminal conduct into federal crimes and require a substantial increase in federal police resources. (See *U.S. v. Bass*, supra at 349; *Rewis v. U.S.*, supra at 812).

An analysis of the provisions of the Louisiana Commercial Bribery Statute as it affects the instant case and is affected by the Travel Act indicates the elements of this misdemeanor to be as follows:

Commercial bribery is the giving of anything of apparent value (in the instant case, stock of a Louisiana corporation - not even known of by Petitioner Perrin) to any private employee (government informer Willis), without the knowledge and consent of the employer (Petty-Ray, New Orleans, Louisiana) with the intent to influence such private employees act in relation to the employer's affairs. Any commercial bribery which occurred was completed on July 16, 1975 when through an alleged conspiracy between government informer Willis and co-defendants Levy and LaFont, in return for stock in Black Gold Energy Resources, Inc., a Louisiana corporation, Willis stole from his employer, Petty-Ray, and on July 16, 1975 delivered to LaFont uninterpreted raw seismographic materials which were allegedly the property of Petty-Ray, and which seismographic materials remained in LaFont's possession until September 25, 1975. (See Indictment Count 1 Overt Act (2), Page 3; Second supplemental record on Appeal Page 7; Transcript Volume 14 Page 799) Petitioner Perrin, as the independent geologist consulted by the "criminal shark" referred to in the dissent of Circuit Judge Rubin, fleetingly saw one sheet of said alleged seismographic

material covering land in Louisiana when he first entered the picture in the office of co-defendant Levy on July 24, 1975, eight days after completion of any commercial bribery misdemeanor committed by Messrs. Willis, Levy and LaFont. Petitioner Perrin informed Messrs. Levy, LaFont and Willis that he could not interpret said materials but after an interpretation by a seismologist or geophysicist was obtained he would need gravity maps and ownership maps to verify the location on the ground of the materials depicted in said report. Petitioner Perrin did not know at that time that the alleged seismographic materials were stolen and was not so informed by government agent Willis until August 4, 1975 *after* Petitioner Perrin was persuaded by Willis at the International Trade Mart in New Orleans to select an interstate nexus to attempt to transform the completed intrastate commercial bribery misdemeanor into a federal felony under the Travel Act, nineteen days after the completion of the alleged commercial bribery.[1] (See Tape 6, page 87, lines 5 - 27; Tape 5, page 56; Transcript Vol. 13, pp. 807, 808; Transcript Vol. 15, p. 1276.)

1. The majority opinion of the Fifth Circuit erroneously states..."the evidence makes clear that Perrin knew the significance of selecting an out-of-state source for the gravity maps and that he fully appreciated the fact that an out-of-state supplier was less likely to notice leasing activities in northern Louisiana". (See Appendix, Petition for Writ of Certiorari, Page A-15, lines 27 - 33.) On the contrary, the evidence is unmistakably clear that at the time on August 4, 1975 when Perrin was persuaded by Willis to select the out-of-state source for the gravity maps he had not been told that the alleged seismographic materials which he fleetingly saw once on July 24, 1975 and could not interpret, were "stolen". Perrin received this shocking information from government informer Willis on August 4, 1975 after Perrin was induced to select the interstate nexus. The entirety of the colloquy, together with the time frame, are conclusively shown in the government's own exhibit. (T-6, Tape No. 6, Transcript thereof prepared by the government pp 87 and 88; Tape 5, p. 56; T. Vol. 13, pp. 807 and 808; T Vol 15,

Clearly Petitioner Perrin had no criminal intent to violate the intrastate Commercial Bribery Act nor did he criminally intend to nor did he enter any conspiracy or violate the Travel Act, as Petitioner Perrin did not learn until after his alleged selection of the interstate nexus that the alleged seismographic materials were stolen.

(Footnote 1 - continued)

p. 1276.)

Tape 6, August 4, 1975, pp. 87 and 88

WILLIS: If it ain't there, it ain't contoured. So, you know anything about these exchange services.

PERRIN: I really don't. I really don't.

WILLIS: *Here, look it over, I've got it marked.*

PERRIN: Uh, I've done some business with them, but uh, so infrequently I mean, hell, it's....

WILLIS: *They're right, they're right here.* (Pause)

PERRIN: What have you got on this one?

WILLIS: Nothing. I just had a pencil stuck in there.

PERRIN: Oh, you're the only ones who have....

WILLIS: Yea, just to mark it, but hell, that covers the whole world.

PERRIN: Yea, yea. That's right, that's right. One's as good as another.

WILLIS: *Now you pick it.*

PERRIN: I don't know.

WILLIS: *That's your department. We're to fill your request.*

PERRIN: Grav, Gravity Map Service doesn't advertise as big. If that means anything.

The record is incontravertible that neither Petitioner Perrin nor expert witness Aycock, nor any other consulting sub-surface geologist could have interpreted the stolen alleged seismographic materials. Since Petitioner Perrin could not possibly have had any intent to commit commercial bribery or to select an interstate nexus to facilitate a crime, the Travel Act could not under any stretch of the imagination enmesh Petitioner, Vincent R. Perrin, Jr., nor could such a completed state misdemeanor form the basis of any Travel Act violation nineteen days after the completion of said state misdemeanor, unless proof was afforded by the government that Perrin, had the criminal intent to and did violate the State Commercial Bribery Statute, and prior thereto was a vice baron engaged in a "business enterprise" involving gambling, liquor, narcotics or prostitution, in one state, but directed same from another state where he resided, through the use of interstate facilities. No such proof exists and was not in fact made. (See Legislative History, Petition for Writ of Certiorari, Pp A-40 and A-41). Perrin's conviction is a

---

(Footnote 1 - continued)

WILLIS: Well

PERRIN: Now you're gonna have to check with them to see if they have it.

WILLIS: Yea.

PERRIN: We'll try Gravity Map first, and then Lyle if they don't have it.

WILLIS: Gravity Map and then Lyle?

PERRIN: Then Lyle.

WILLIS: *Where's Gravity Map?*

PERRIN: They're in Houston.

classic example of justice veiling "Guilt by Association" - first by accepting representation of the criminal shark - then being tried in the same forum with later admitted conspirators.

As is abundantly clear from the legislative history, murder would not be covered by the Travel Act, unless the government proved beyond a reasonable doubt that said murder was committed to further one of the referred to "unlawful business enterprises". Legislative History, Appendix, Petition for Writ of Certiorari, P. A-43, lines 6-14.

(Footnote 1 - continued)

WILLIS: All right. *And Lyle?*

PERRIN: ...is in Tulsa.

WILLIS: *This ad here?*

PERRIN: Yea.

WILLIS: OK. Gravity Map Number 1. Lyke Number 2. Yea. She's something else, too, and I'm... like I say, I'm ready to move on this...we've got to move fast or else Total-Leonard gonna beat us. You know what this deal is all about, so we gotta keep...

PERRIN: Yea, I, I know that angle of it, but ah, *beyond that I'm in the dark.*

WILLIS: Well, you know that, you know who's behind it.

PERRIN: *I think I do.*

WILLIS: It's CARLOS...

PERRIN: Uh huh.

WILLIS: ...if you don't know. I know too that you're supposed to handle the drilling or so I've heard.

It is also abundantly obvious from the legislative history that good reason exists for the number of decisions holding that isolated, minimal, inconsequential, incidental and non-essential use of interstate facilities do not constitute violations of the Travel Act. *Rewis v. U.S., supra, U.S. v. Altobella,* 442 F.(2d) 310 (7th Cir. 1971); *U.S. v. Isaacs,* 493 F. (2d) 1124 (7th Cir. 1974, *Cert. denied,* 417 U.S. 976; *U.S. v. Archer,* 486 F. (2d) 670 (2nd Cir. 1973); *U.S. v. Gooding,* 473 F (2d) 425 (5th Cir. 1973).

The legislative history indicates that the scope of the Travel Act was limited to certain types of businesses that are known to be allied with organized crime and specifically limited to the four types of business specified in subsection B. (See Legislative History, Petition for Writ of Certiorari in Behalf of Vincent R. Perrin, Jr., pp. A-41, line 8, et seq. p. A-42, p. A-43.)

Also, sight must not be lost of the fact that as stated in it its title The Travel Act proscribes "Interstate and Foreign Travel or Transportation in aid of Racketeering Enterprises", and as indicated throughout the legislative history, the Travel Act was principally designed to assist states in prose-

---

(Footnote 1 - continued)

PERRIN: No, the operating end of it.

WILLIS: Yea. But uh, well I'm waiting on my assurances now...

PERRIN: Uh huh.

WILLIS: ...from LEVY via...you know, MARCELLOS via LEVY, as far as you know, that I don't get cut or whatever, it's just that I want you to understand that this data is good data, coherent, it's perfect, *but it's stolen.*

cuting vice barons who resided in one state and conducted racketeering enterprises in another state or other states with considerable, multiple, consequential, non-incidental and essential use of interstate facilities to conduct, foster and facilitate the racketeering enterprises proscribed by the Travel Act.

CONCLUSION

Petitioner, Vincent R. Perrin, Jr. is not a vice baron engaged in any of the proscribed racketeering business enterprises but was and is a consulting subsurface geologist who for 20 years enjoyed an excellent reputation, as testified to by U.S. District Judge Lansing L. Mitchell.

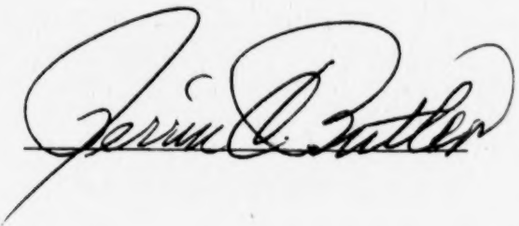
For the foregoing reasons it is respectfully submitted that the Honorable, Supreme Court of the United States reverse the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed judgement of conviction against Petitioner, Vincent R. Perrin, Jr.

Respectfully Submitted,

Perrin C. Butler
Suite 1215
144 Elk Place Plaza
New Orleans, Louisiana 70112
Telephone: 504-581-2792
Counsel for Vincent R. Perrin, Jr.

CERTIFICATE OF SERVICE

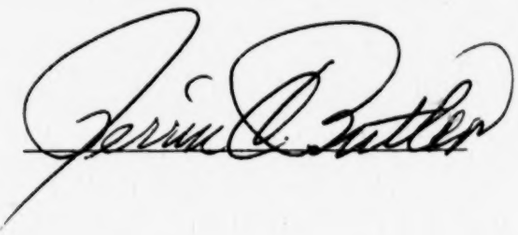
I certify that copy of the foregoing has been served upon Wade H. McCree, Jr., Solicitor General, Philip B. Heymann, Assistant Attorney General, T. George Gilinsky and James Roland Difonzo, Attorneys, Department of Justice, Washington, D.C., 20530 by depositing same in the United States Mail, properly addressed with adequate postage this 11th day of June, 1979.



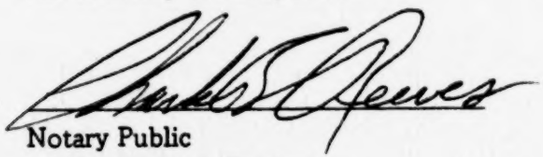
AFFIDAVIT OF SERVICE

State of Louisiana
Parish of Orleans

Personally appeared Perrin C. Butler who declared under oath that he is a member of the bar of the State of Louisiana, he is counsel of record for Petitioner, Vincent R. Perrin, Jr., he intends to enter his appearance in and become admitted to the Bar of the Supreme Court of the United States, that copies of the foregoing have been served upon Wade H. Mc Cree, Jr., Solicitor General, T. George Gilinsky and James Roland Difonzo, Attorneys, Department of Justice, Washington, D.C., 20530 by depositing same in the United States Mail properly addressed with adequate postage this 11th day of June, 1979.



Sworn to and subscribed before me
this 11th day of June, 1979.



Notary Public
My Commission Expires
at my Death.

No. 78-959

In the Supreme Court of the United States

OCTOBER TERM, 1978

VINCENT R. PERRIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

JAMES ROLAND DIFONZO
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

Cases—Continued Page

Statutes:

Statutes—Continued Page

Miscellaneous:

Miscellaneous—Continued Page

Miscellaneous—Continued Page

Miscellaneous—Continued Page

Miscellaneous—Continued Page

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-959

VINCENT R. PERRIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 580 F.2d 730.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1978. A petition for rehearing was denied on November 15, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on Decem-

ber 15, 1978, and was granted on March 19, 1979, limited to Question One in the petition (Pet. 2). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether commercial bribery prohibited by state criminal statute constitutes "bribery * * * in violation of the laws of the State in which committed," within the meaning of the Travel Act, 18 U.S.C. 1952.

STATUTES INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.
>
> * * * * *

La. Rev. Stat. Ann. § 14:73 (West 1974) provides:

> Commercial bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any private agent, employee, or fiduciary, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's, or fiduciary's action in relation to the principal's or employer's affairs.
>
> The agent's, employee's or fiduciary's acceptance of or offer to accept, directly or indirectly, anything of apparent present or prospective value under such circumstances shall also constitute commercial bribery.
>
> The offender under this article who states the facts, under oath, to the district attorney charged with prosecution of the offense, and who gives evidence tending to convict any other offender under this article, may, in the discretion of the district attorney, be granted full immunity from prosecution for commercial bribery, in respect to the particular offense reported.

Whoever commits the crime of commercial bribery shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

STATEMENT

1. Petitioner and co-defendants Duffy LaFont, David Levy, Albert Izuel and Jim Haddox were indicted in the United States District Court for the Eastern District of Louisiana on charges of violating the Travel Act, 18 U.S.C. 1952, and conspiring to violate the Act, in violation of 18 U.S.C. 371.[1] The basis of the indictment was a scheme to use the facilities of interstate commerce for the purpose of promoting commercial bribery in violation of the laws of the State of Louisiana, La. Rev. Stat. Ann. § 14:73 (West 1974).[2] Following a trial by jury,

[1] Petitions for certiorari have been filed by co-defendants Levy (No. 78-5855) and LaFont (No. 78-5930), raising the same question of statutory interpretation presented by petitioner Perrin. Those petitions are still pending.

[2] Count 1 of the indictment charged petitioner and all four co-defendants with conspiracy to violate the Travel Act. Count 2 charged petitioner, LaFont and Levy with Travel Act violations arising from interstate telephone communications and use of common carrier facilities in interstate commerce. Counts 3 and 4 charged petitioner, LaFont and Levy with Travel Act offenses arising from interstate telephone communications. Counts 5 and 6 charged LaFont, Levy, Izuel and Haddox with Travel Act violations arising from interstate telephone communications and interstate travel. The proceedings against Izuel and Haddox were severed by the district court at trial and the charges against them were subsequently dismissed by the government.

petitioner, LaFont and Levy were convicted on the conspiracy count and two substantive Travel Act counts (Counts 2 and 3).[3] Petitioner received a one-year suspended sentence on each count (Pet. App. A-6).[4]

The evidence at trial showed that petitioner, Levy and LaFont engaged in a scheme to exploit stolen geological data obtained from Roger Willis, an employee of the Petty-Ray Geophysical Company. Willis was induced to steal the data through bribery. The evidence also showed that petitioner and his co-defendants used the facilities of interstate commerce in furtherance of the bribery scheme (Pet. App. A-5 to A-6, A-11 to A-14).

Petty-Ray Geophysical Company, the victim of the conspiracy, was in the business of conducting geological explorations and selling data to oil producing companies (Tr. 107-109).[5] The company treated the data that it developed as confidential information due to its substantial commercial value (Tr. 109-110, 207-208, 157-158).[6] Willis worked at Petty-Ray as an

[3] LaFont and Levy were also convicted under Counts 5 and 6 of the indictment.

[4] LaFont and Levy received concurrent two-year prison sentences on each count (Pet. App. A-6).

[5] Petty-Ray probed areas beneath the surface of the earth for potential oil deposits by inducing vibrations into the earth and analyzing their transmission patterns (Tr. 127, 222-223).

[6] Executives from Petty-Ray testified that strict confidentiality was essential to the business of the company. If proprietary information developed by the company were to become public, it could not be sold. And if it were to be disclosed after sale to a customer, that would infringe the customer's contractual rights (Tr. 161, 166-167, 246-248, 267).

analyst of seismic data sheets, but he did not have authority to sell or release the company's data (Tr. 159, 181, 184-186, 190-192). In June 1975, LaFont approached Willis and proposed that he steal certain exploration data from Petty-Ray (Tr. 519-523). In return for the theft, LaFont promised that Willis would receive a percentage of the profits of a corporation organized by LaFont and Levy to exploit the stolen data (Tr. 524-529). Willis agreed, and gave LaFont various geological materials stolen from Petty-Ray (Tr. 520-522, 529-535, 566-570, 599-607).

Petitioner Perrin, a consulting geologist, joined the conspiracy in order to interpret the stolen data (Tr. 1222-1223, 1272-1274). At a meeting in July 1975, petitioner, LaFont, Levy and Willis elaborated their plan (Tr. 536-542, 1274). Having seen the stolen data, petitioner expressed the view that "it looked real good" and instructed the group that he would need property ownership maps of the area in question to determine how it could best be exploited (Tr. 539-542). Petitioner also directed the group to obtain gravity maps to assist in interpreting the data (*ibid.*; Tr. 1335).[7] Willis informed petitioner that he worked for Petty-Ray and that the data was compiled by Petty-Ray (Tr. 538-539).

After this meeting, Willis contacted the FBI and disclosed the details of the scheme (Tr. 270, 542-543, 1454-1455). He agreed to allow the FBI to record

[7] Gravity maps are used by geologists to correlate and check seismic data (Tr. 1294-1296, 1418-1419).

conversations between himself and the other conspirators (Tr. 271-281, 543-550). Forty-seven tape recordings were made, 37 of which were subsequently played for the jury (Tr. 1087-1088, Gov't Exh. T-48).[8]

Petitioner and LaFont directed Willis to call a firm in Richmond, Texas, to secure the desired gravity maps (Tapes 2, 5, 6). Petitioner intentionally selected an out-of-state supplier, thinking that it would be less likely to notice leasing activities in Northern Louisiana (Pet. App. A-15; Tape 6). Willis placed an interstate telephone call from Louisiana to Texas to inquire about the gravity maps (Pet. App. A-12 to A-15; Tr. 575-576, 1019, 1025). In response to that inquiry, certain materials were shipped the next day by Continental Bus, and Willis picked them up (Tr. 576-578, 1022-1026; Tape 7). This use of interstate facilities formed the basis for Count 2 of the indictment.

Subsequently, Levy made another interstate telephone call to Richmond, Texas, to request immediate delivery of the gravity maps. When a delay in the shipment resulted, Levy told petitioner to buy the gravity maps from another source (Pet. App. A-13; Tr. 1019-1021; Tapes 7, 12, 13). This interstate telephone communication formed the basis for Count 3 of the indictment.

[8] The district court refused to admit into evidence written transcripts of the tapes and also struck from the record the notes made by the court reporter while the recordings were being played (Tr. 1081-1088). Consequently, the record contains no written transcription of the tapes.

The original investor in the scheme, who planned to supply capital needed to exploit the stolen data, was Carlos Marcello, a reputed organized crime figure (Tape 2, Tr. 387). Marcello introduced petitioner to LaFont and Levy (Tr. 1271-1272, 1307). Under the original arrangement, Marcello was to pay LaFont, Levy and Willis 2% of the profits to be generated by the stolen data (Tape 24). Petitioner, who had had prior dealings with Marcello (Tr. 1257-1270) and who continued to work with him in connection with the scheme (Tr. 1271-1274, 1314-1315), was to receive a cut from Marcello's share (Tape 5). Due to heavy surveillance by federal agents, however, Marcello backed out of the scheme (Tr. 1349-1350; Tapes 20, 22, 24).[9] Petitioner subsequently attempted to find an alternative investor but met with no success (Tapes 23-27, 30).

At trial, petitioner took the witness stand in his own defense. He admitted that he had been informed that the data supplied by Willis was stolen (Tr. 1317, 1320-1321, 1331-1333, 1335-1336, 1347, 1378). When confronted during cross examination with the substance of his recorded conversations, petitioner admitted that he was considered to be part of the deal by the others (Tr. 1328), that he suggested the formation of a corporation to prevent future difficulties in the operation of the scheme (Tr. 1328, 1338-1339), that he recommended that the data needed to exploit

[9] Marcello was under continuous surveillance by the federal organized crime strike force in New Orleans (Tr. 353-354, 387).

the stolen materials be obtained from out-of-state sources (Tr. 1340-1341), that he discussed alternative ways to "skin a cat" when Marcello backed out (Tr. 1348-1349, 1357-1358), and that he anticipated that he could obtain financial benefits from the scheme (Tr. 1367). Petitioner also admitted that he recognized that his reputation was at stake as a result of the scheme (Tr. 1365-1367), but he continued to participate partly because he was intrigued by it (Tr. 1371-1372) and partly because he did not know how to extricate himself (Tr. 1376-1377).

2. The court of appeals affirmed the convictions of petitioner and his co-defendants (Pet. App. A-1 to A-22). The court rejected petitioner's contention that the Travel Act extends only to official and not commercial bribery, reasoning that the word "bribery" is generic in scope (*id.* at A-8). In support of its analysis, the court cited this Court's decision in *United States* v. *Nardello*, 393 U.S. 286 (1969), which held that the term "extortion" (appearing in the same portion of the Travel Act as the word "bribery") should be interpreted generically and should not be limited to its common law definition (*id.* at A-9). The court also noted that Congress has passed a number of federal statutes prohibiting commercial bribery, a fact that, in the court's view, reflects congressional recognition that the term "bribery" embraces more than corruption of public officials.

In adopting a generic interpretation of the statute, the court followed the decision of the Fourth Circuit

in *United States* v. *Pomponio*, 511 F.2d 953, cert. denied, 423 U.S. 874 (1975), which had also held that the Travel Act encompasses commercial bribery. The court declined to follow the decision of the Second Circuit in *United States* v. *Brecht*, 540 F.2d 45 (1976), which had reached the opposite result.

Judge Rubin dissented (Pet. App. A-19 to A-22). He reasoned that Congress should not be presumed to have included commercial bribery within the prohibition of the Travel Act because relatively few states had adopted commercial bribery legislation at the time of enactment of the federal statute. Judge Rubin also noted that commercial bribery frequently is treated as a misdemeanor under state law and concluded that it would be anomalous to convert commercial bribery into a federal felony under the Travel Act (*id.* at A-21). Finally, Judge Rubin asserted that the Act should be interpreted narrowly, due to its purportedly ambiguous coverage (*id.* at A-22).

SUMMARY OF ARGUMENT

1. The Travel Act, 18 U.S.C. 1952, forbids use of the facilities of interstate commerce to promote or facilitate the promotion of a broad spectrum of unlawful activities, including "bribery * * * in violation of the laws of the State in which committed or of the United States." Under Louisiana criminal statute, it is unlawful to engage in "commercial bribery," which is defined as "the giving or offering to give, directly or indirectly, anything of apparent present

or prospective value to any * * * employee * * * with the intent to influence * * * such * * * employee's * * * action in relation to the * * * employer's affairs." La. Rev. Stat. Ann. § 14:73. The Travel Act, literally construed, applies to "bribery" as forbidden by the Louisiana criminal statute.

The literal text of the Travel Act applies to all bribery offenses, as proscribed by state or federal law, not just the subspecies of bribery directed at public officials. If Congress had intended to limit the Travel Act to official bribery, it surely would have said so expressly, just as it did in the official bribery statute, 18 U.S.C. 201(b), (c), (f), (g). Instead of limiting the offense to a particular category of bribery, such as official bribery, Congress made the Travel Act applicable to bribery of all kinds. The statute thus uses the term "bribery" generically, to designate the corrupt payment or receipt of a private advantage to induce a breach of duty recognized under the law. Although petitioner contends that the statute should be confined to official corruption, "[n]othing on the face of the statute supports this reading of it." *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 3.

2. Although it is true that the term "bribery" was used at common law to designate various forms of official bribery, the common law definition does not restrict the scope of the Travel Act. The common law definition of bribery underwent a process of continuous evolution and growth. In the age of Sir Edward Coke, "bribery" extended only to the

corruption of judges. See III E. Coke, *Institutes of the Laws of England* 144, 147 (1628). By the nineteenth century, the term had been expanded to embrace corruption of all kinds of public officials, whether judicial or not, as well as witnesses, jurors, and voters, and also to include corrupt payments to procure appointment to public office. See 3 J. Stephen, *A History of the Criminal Law of England* 250-255 (1883). Thus, the common law provides no settled definition of the term "bribery" that could be relied on to delimit the coverage of the Travel Act. In each of the stages of its development, the common law defined bribery differently. The scope of the Travel Act cannot logically be made to depend on the state of development of the common law at an arbitrarily selected point in its history.

The appropriate standard for interpreting the term "bribery" is the twentieth century definition, as it was employed by Congress and the state legislatures when the Travel Act was adopted in 1961. By 1961, Congress had proscribed various forms of commercial bribery under federal criminal statutes. Similarly, by 1961, 43 states had enacted statutes prohibiting bribery of employees, agents, athletes, and other persons deemed to be in a position requiring strict fidelity. As the court of appeals recognized, these statutes show unmistakably that the term "bribery," as used by Congress and the state legislatures, embraced private as well as official corruption. Since the Travel Act extends to all forms of bribery illegal under state or federal statute, and since state and

federal statutes included commercial and other forms of private bribery when the Travel Act was enacted, there is no basis for confining the Act to official bribery.

In light of this background, this Court's decision in *United States* v. *Nardello*, 393 U.S. 286 (1969), announces the correct rule of interpretation to be applied in the present case. In *Nardello*, the Court considered whether the term "extortion," appearing in the same portion of the Travel Act as the word "bribery," should be limited to its common law meaning. The Court held that it should not, declining to give the statute the "unnaturally narrow reading" urged by the defendant. *Id.* at 296. The Court noted that, in contemporary usage, the word "extortion" is "generic," extending to all forms of threats used to obtain the property of another person, not just extortionate schemes involving public officials. *Ibid.* Here, as in *Nardello*, the terms used in the Travel Act should be given their generic meaning. There is no justification for implying a limitation on the statute's broad coverage.

3. Applying the Travel Act to commercial bribery would serve the congressional purpose in enacting the statute. The Travel Act was "primarily designed to stem the 'clandestine flow of profits' " to organized crime. See *United States* v. *Nardello*, *supra*, 393 U.S. at 291-292. The extensive use by organized crime of commercial bribery to infiltrate honest business firms and to generate illicit revenue is well documented. It would be anomalous to interpret the

statute in such a way that organized crime, while prohibited from preying on American business firms through crude techniques of "arson" and "extortion," would be free to resort to sophisticated schemes of commercial bribery to increase its illegal profits. Congress' purpose in enacting the statute would be frustrated if racketeers, based in one state, could extract revenues from business firms or financial institutions in other states through corruption of their trusted agents and employees.

Although the statutory purpose of inhibiting the activities of organized crime would be promoted by applying the Travel Act to commercial bribery, the government need not show in a particular case that the defendant is affiliated with organized crime or that a particular level of organization exists in the criminal venture. The Act was intended to reach types of illegal activity frequently used by organized crime, and the corrective measure selected by Congress is general in scope. The Act imposes penalties on "any individual" who engages in the conduct prohibited by its terms. See *United States* v. *Nardello*, *supra*, 393 U.S. at 293. There is no requirement that in any individual case the government prove "racketeering" or "organized illegal activity," conduct that is undefined by the statute and is not specified as an element of the offense. See *United States* v. *Culbert*, 435 U.S. 371, 374-380 (1978).

4. This case presents no occasion for applying the "rule of lenity" or the rule of "strict construction." The literal text of the Travel Act, its historical context, and the purposes sought to be achieved by Con-

gress all support the generic interpretation adopted by the court below. "The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one." *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943).

For similar reasons, the rule of lenity has no application here. There is no ambiguity that defies resolution and requires resort to such a rule of construction. The rule of lenity only applies when "after 'seiz[ing] every thing from which aid can be derived' * * * we are left with an ambiguous statute." *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977). Because the meaning of the Travel Act can be ascertained with reasonable certainty, there is no ambiguity necessitating a curtailment of its literal coverage. See *United States* v. *Culbert*, *supra*, 435 U.S. at 379; *United States* v. *Naftalin*, *supra*, slip op. 10; *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7.

ARGUMENT

THE TRAVEL ACT USES THE TERM "BRIBERY" IN ITS GENERIC SENSE AND THEREBY ENCOMPASSES COMMERCIAL BRIBERY ILLEGAL UNDER STATE OR FEDERAL STATUTE

By its decision in the present case, the Fifth Circuit joins the Fourth Circuit in concluding that the Travel Act extends to commercial bribery illegal under state or federal law. See *United States* v. *Pom-*

ponio, 511 F.2d 953, cert. denied, 423 U.S. 874 (1975). The Second Circuit has reached a different conclusion, reasoning that the term "bribery" should be limited to official bribery, as the term was limited at common law. *United States* v. *Brecht*, 540 F.2d 45 (1976).

We submit that the decision below is faithful to the language and purpose of the statute. The Second Circuit's interpretation engrafts a limitation on the Travel Act that is inconsistent with its clear text. The statute extends to all forms of bribery illegal under state or federal law, not just the subspecies of bribery directed toward public officials. The history of the statute and the legislative understanding of the term "bribery" at the date of its enactment offer additional support for this interpretation. As we demonstrate below, a restriction of the Travel Act to official bribery would conflict with the plain meaning of the words used by Congress and would frustrate the objectives that Congress intended to achieve by enactment of the provision.[10]

[10] This Court's grant of certiorari in the present case was limited to the question whether the Travel Act applies to commercial bribery. In his brief (pages 9-14), petitioner nonetheless discusses questions that this Court declined to review, including the sufficiency of the evidence proving guilt and the use of the facilities of interstate commerce. In light of this Court's limited grant of certiorari, we do not address those questions, except to note that the evidence, viewed in the light most favorable to the government (*Burks* v. *United States*, 437 U.S. 1, 17 (1978)), amply established that petitioner was aware of the purposes of the conspiracy from his first involvement, that he caused the facilities of interstate commerce to be used with the intent to carry on an illegal commercial bribery scheme, and that he thereafter promoted the operation of the scheme in a manner that was calculated to yield profits for himself and bribery payments for the corrupted employee (see Pet. App. A-11 to A-16).

A. The Language Used By Congress In The Travel Act Is Generic And Is Not Limited To A Particular Subspecies Of Bribery

As this Court has repeatedly noted, the " 'starting point in every case involving the construction of a statute is the language itself.' " *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979), slip op. 6; *Reiter* v. *Sonotone Corp.*, No. 78-690 (June 11, 1979), slip op. 3-4. 18 U.S.C. 1952 provides that "[w]hoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce" with the intent to promote "any unlawful activity," and thereafter promotes or attempts to promote such activity, is guilty of an offense. The statute defines the term unlawful activity to include, *inter alia*, "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." It is immediately apparent that Congress has included no limiting modifier that would restrict the term "bribery" to a subspecies such as "official bribery." Instead of referring to bribery of public officials, the statute broadly refers to bribery prohibited under state or federal law, without limitation on the category. Thus, although petitioner contends that the statute should be confined to official bribery, "[n]othing on the face of the statute supports this reading of it." *United States* v. *Naftalin*,

No. 78-561 (May 21, 1979), slip op. 3. See also *United States* v. *Culbert*, 435 U.S. 371, 373 (1978). "No mention is made of a purpose to distinguish between different forms of [bribery], as would be expected if the distinction had been intended." *United States* v. *Turley*, 352 U.S. 407, 414-415 (1957).

The term "bribery," like the term "extortion" which appears in close conjunction with it in the statute, has a "generic" meaning. See *United States* v. *Nardello*, 393 U.S. 286, 296 (1969).[11] The literal meaning of the term "bribery," although inclusive of official corruption, is not so limited. Bribery is a general term that designates the tendering or receipt of a private advantage as a reward for the violation of duty. See, *e.g.*, *United States* v. *Esperdy*, 285 F.2d 341, 342 (2d Cir.), cert. denied, 366 U.S. 905 (1961) (dealing with bribery of athletes): "Bribery in essence is an attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty." [12]

[11] The *Nardello* case is discussed in detail at pages 32-36, *infra*.

[12] *Webster's Third New International Dictionary* 275 (1961) defines a "bribe" as "a price, reward, gift or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct esp. of a person in a position of trust (as a public official) * * * something that serves to induce or influence to a given line of conduct * * *." *The Oxford English Dictionary* 1093 (1933) defines "bribery" as "[t]he act or practice of giving or accepting money * * * with the object of corruptly influencing the judgment or action; * * *." Although official bribery is included within this generic definition, other forms of bribery are clearly included as well. See *United States* v. *Zacher*, 586 F.2d 912, 915-916 (2d Cir. 1978).

The generic scope of the word "bribery" as used in Section 1952 is evident when other statutes dealing with limited kinds of bribery are considered. When Congress wished to confine the coverage of a statute to official bribery, it did so expressly. Thus, 18 U.S.C. 201(b) prohibits the offer of anything of value "to any public official or person who has been selected to be a public official" if the purpose of the offer is to "influence any official act" or otherwise cause a breach of lawful duty. See also 18 U.S.C. 201(c), (f), and (g), which are expressly limited to "official" corruption. If Congress had wished to limit the scope of the Travel Act to official corruption, it surely would have said so, rather than extending the statute to any form of bribery "in violation of the laws of the State in which committed or of the United States." [13]

The "ordinary understanding" of the word "bribery" is also fortified by the "structure of the Act." *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, No. 77-952 (Feb. 27, 1979), slip op. 5. As this Court has previously emphasized, the Travel Act "is concerned with a broad spectrum of 'unlawful activity.' " *Erlenbaugh* v. *United States*, 409 U.S. 239, 246 (1972). The statute is broadly directed at speci-

[13] As discussed on pages 24-26, *infra*, Congress has proscribed commercial bribery and other forms of non-official bribery under several different federal criminal statutes. If the Travel Act were limited to "official" bribery it might be deemed to be inapplicable to those federal offenses as well as offenses arising under state law. See *United States* v. *Pomponio*, *supra*, 511 F.2d at 955-957.

fied business enterprises engaged in gambling, liquor, narcotics, or prostitution offenses. 18 U.S.C. 1952 (b)(1). It also extends to individual acts of "extortion" or "arson," as well as "bribery." 18 U.S.C. 1952(b)(2). Like commercial bribery, extortion and arson are widely used by criminals to prey on legitimate business.[14] See *United States* v. *Nardello*, *supra*, 393 U.S. at 291 n.8, 295 n.13. In sum, the statute reaches a wide range of criminal activities that can be promoted through use of the facilities of interstate commerce, including those inflicting commercial injury.[14] In light of the evident scope of the statute, it would be inappropriate to deprive the term "bribery" of its literal meaning and adopt the "unnaturally narrow reading" urged by petitioner. *United States* v. *Nardello*, *supra*, 393 U.S. at 296.

B. The Common Law Definition Of Bribery Does Not Restrict The Travel Act To Official Bribery

Despite the fact that the literal language of the Travel Act extends to bribery of all kinds and is not limited to official corruption, petitioner argues, in reliance on *United States* v. *Brecht*, *supra*, 540 F.2d at 48, that such a limitation should be implied because the term was so restricted "at common law" (Br. 6-7). In our view, that contention is meritless for two reasons. First, the definition of bribery was subject to a process of continuing evolution at com-

[14] See R. Kennedy, *The Program of the Department of Justice on Organized Crime*, 38 Notre Dame Law. 637, 639 (1963): "This law has the broadest scope and the greatest potential of the new antiracketeering statutes."

mon law. Delimiting the scope of the Travel Act by reference to the common law would give the Act a different meaning depending on the historical era that was selected as the point of reference. Second, any common law definition would be wholly anachronistic. Long before the Travel Act was adopted by Congress in 1961, the word "bribery" had an accepted legal meaning that was broader than the broadest common law definition. As we demonstrate below, the appropriate point of reference in the evolution of the definition of bribery is the twentieth century, when the Travel Act was enacted. Congress should be presumed to have used the expression "bribery * * * in violation of the laws of the State in which committed or of the United States" in reference to existing legislation in 1961, not in reference to the common law in the age of Coke, Hale or Blackstone.

1. *The common law definition of bribery was subject to continuous growth and provides no settled meaning useful in construing the Travel Act*

As this Court noted in *United States* v. *Nardello*, *supra*, 393 U.S. at 293 n.11, "[b]ribery has traditionally focused upon corrupt activities by public officials." In the seventeenth century, the crime of bribery extended only to corruption of judges. See III E. Coke, *Institutes of the Laws of England* 144, 147 (1628).[15] In the eighteenth century, Blackstone

[15] Coke defined bribery as "a great misprision (1) when any man in judicial place (2) takes any fee or pension, robe, or livery, gift, reward (3) or brocage (4) of any person, that

defined bribery as an offense involving a judge "or other person concerned in the administration of justice" and included the giver of the bribe as well as the recipient as an offender. 4 W. Blackstone, *Commentaries on the Laws of England* 139-140 (1765). Hawkins, writing after Blackstone, defined bribery to include not only the corruption of judges and persons involved in the administration of justice, but also "the taking or giving of a reward for offices of a public nature." 1 W. Hawkins, *Pleas of the Crown* 311-313 (1777). By the nineteenth century, bribery had come to subsume corruption of "any public officer," whether or not a judicial officer, as well as bribery of voters and witnesses. See J. Stephen, *Digest of the Criminal Law* 85-87 (1877). See also 3 J. Stephen, *A History of the Criminal Law of England* 250-255 (1883); 1 J. Gabbett, *A Treatise on the Criminal Law* 163 (1843). In sum, although beginning on a "narrow base," the evolution of the common law definition of bribery demonstrates an "ever-expanding growth in the recognition of an important social interest." R. Perkins, *Criminal Law* 468 (2d ed. 1969). See also *id.* at 470-474; 1 W. Burdick, *The Law of Crime* 426-429 (1946).

If petitioner were correct in asserting that a common law definition should be adopted as the measure of the term "bribery" in the Travel Act, the Court

---

hath to do before him any way (5), for doing his office * * *." *Id.* at 144. He emphasized, however, that "bribery is only committed by him that hath a judicial place;" the offense could not be committed by other public officials. *Id.* at 147.

would be required to select a point in the common law's development as the standard of reference. If the common law in the age of Coke were selected, the Travel Act would cover only interstate activities aimed at the corruption of judges. On the other hand, if a later period were selected, the statute would have a broader coverage.[16] This, we submit, would be an essentially arbitrary choice, without a basis in the statute.[17] Moreover, there is no necessity to select an historical definition of bribery rooted in a particular common law period. The term bribery had acquired a generic meaning in the early part of the twentieth century, as we demonstrate below. It is that current meaning that is significant in interpreting the Travel Act.

---

[16] The Second Circuit's *Brecht* decision failed to recognize the continuous growth in the common law definition of bribery. Simply stated, the common law yielded "new products at every stage." O. Holmes, *The Common Law* 1 (1923).

[17] Reliance on the common law to define the terms in the Travel Act would introduce other anomalies. For example, if the term "arson" were limited to its common law meaning, it would be restricted to cases in which a private dwelling was burned. See III Coke, *supra*, at 65; *United States* v. *Conway*, 507 F.2d 1047, 1051 (5th Cir. 1975). And, as noted in *United States* v. *Nardello*, *supra*, 393 U.S. at 289, the term "extortion" was limited at common law to the acts of public officials. Reading such limitations into the Act would be inconsistent with the manifest purpose to reach modern statutory offenses (including narcotics, liquor and gambling offenses), which had no common law sources. Reference to these types of statutory offenses demonstrates that Congress was not concerned with common law concepts but with present day meanings.

2. *When Congress enacted the Travel Act the term "bribery" included commercial bribery and other forms of non-official bribery*

Because the Travel Act is concerned with bribery "in violation of the laws of the State in which committed or of the United States," it is appropriate to examine federal and state bribery legislation in existence in 1961, the date of enactment of the Travel Act. That examination shows unmistakably that the term bribery, as understood by federal and state legislators, extended to commercial bribery and other forms of non-official bribery.

a. The prevalence of commercial bribery in certain industries in the United States led to calls for corrective federal legislation in the early decades of the twentieth century.[18] Early bills debated in Congress sought to prohibit commercial bribery on a general basis.[19] The criminal statutes ultimately en-

[18] See *Annual Report of the Federal Trade Commission* 52-54 (1920), advising Congress that "commercial bribery of employees is a prevalent and common practice in many industries." The Commission called for new criminal legislation, contending that "[b]ribery is criminal *per se*." See also Stevens, *Some Economic Consequences of Commercial Bribery*, 7 Harv. Bus. Rev. 156, 158-161 (1929), stressing the seriously adverse economic consequences of commercial bribery; accord, J. Flynn, *Graft in Business* 55-67 (1931). The need for new legislation to control commercial bribery was also debated in the legal journals. See, *e.g.*, Note, *Commercial Bribery*, 28 Colum. L. Rev. 799, 804-805 (1928); Note, *Bribery in Commercial Relationships*, 45 Harv. L. Rev. 1248, 1250 (1932).

[19] See, *e.g.*, H.R. 10159, 67th Cong., 2d Sess. (1922). Debates on that bill, which passed the House of Representatives but not the Senate, appear at 62 Cong. Rec. 7763-7767 (1922).

acted by Congress, however, focused on particular industries in which commercial bribery posed a particular threat to the national interest. In 1935, Congress passed the Federal Alcohol Administration Act, ch. 814, 49 Stat. 977, 982 (currently codified in 27 U.S.C. 205(c)), which prohibits "commercial bribery" in the sale of liquor. In the Transportation Act of 1940, ch. 722, 54 Stat. 898, 901-902 (currently codified in 49 U.S.C. 1(17)(b)), Congress prohibited the giving or receipt of a "bribe" in any form to influence a carrier to furnish railroad cars or other vehicles used for common carriage. And only one year before passage of the Travel Act, Congress enacted the Communications Act Amendments of 1960, Pub. L. No. 86-751, 74 Stat. 888, 897 (currently codified in 47 U.S.C. 509(a)(2)), which prohibit "bribery" in contests of skill or knowledge that are broadcast to radio or television audiences.[20] One year after enacting the Travel Act, Congress enacted additional legislation to prohibit "bribery" in "any sporting contest." See 78 Stat. 203-204

[20] Other federal statutes prohibit the giving or receipt of payments to induce a breach of private duty without explicitly using the term "bribery." See, *e.g.*, 18 U.S.C. 215 (corruption of bank officers to influence lending policies); 41 U.S.C. 51 (payment of kickbacks to contractors to procure subcontracts); 29 U.S.C. 186 (corruption of labor union officers). Congress clearly views these forms of corruption as "bribery." See S. Rep. No. 95-605 (Part 1), 94th Cong., 1st Sess. 732-750 (1977) (report on the Criminal Code Reform Act of 1977).

(currently codified in 18 U.S.C. 224).[21] Thus, both immediately before and after enactment of the Travel Act, Congress demonstrated its understanding that the term "bribery" applied to private as well as official corruption.

This statutory pattern, as the court of appeals noted (Pet. App. A-9), is of direct relevance to the question of interpretation presented here. See also *United States* v. *Pomponio, supra*, 511 F.2d at 956. It clearly establishes that Congress has not regarded the term "bribery" as a synonym for official corruption. It shows that Congress viewed commercial corruption, as well as corruption in sports and other contests, as a kind of "bribery" properly subject to federal criminal sanctions.[22]

---

[21] This private bribery provision, like 18 U.S.C. 215, is codified in the same chapter of Title 18 that contains the principal official bribery provision (18 U.S.C. 201).

[22] Congress' prohibition of "commercial" bribery was preceded by action in the English Parliament. The first English statute governing commercial bribery was the Prevention of Corruption Act of 1906, 6 Edw. 7, c. 34, amended by the Prevention of Corruption Act of 1916, 6 & 7 Geo. 5, c. 64. See Ivamy, *The Bribery of Agents*, 16 The Solicitor 245 (1949); James, *Bribery and Corruption in Commerce*, 11 Int'l & Comp. L.Q. 880, 882 (1962):

> Commercial corruption * * * has only come to be an offence against the law [in England] since 1906. In the simple commercial relations of an agricultural community, bribery and corruption were doubtless accepted as an occupational hazard, as a legitimate weapon in the open warfare of the market place. With the growth of joint stock companies, the increasing public ownership of the capital invested in private industry and the delegation of managerial functions to professional business executives, the demand arose for ethical standards in private business organizations. * * * So it has come about that those engaged in both public and private industry have been made amenable to the criminal law, if they abuse their position of trust in order to obtain personal advantage.

b. The pattern in the state legislatures was similar. Near the turn of the century, many states enacted criminal legislation to prohibit commercial bribery, bribery of labor officials, bribery of athletes, and other forms of unofficial corruption. See generally 3 *Wharton's Criminal Law and Procedure* § 1400.1 (1979 Supp.). By 1961, 43 states had adopted criminal bribery statutes prohibiting bribery of agents, common carrier and telegraph company employees, labor officials, bank employees, or participants in sporting events. We have summarized these laws in the Appendix attached to this brief.[23] See also *Model Penal Code* § 223.10 at 113-117, Comment (Tent. Draft No. 11, 1960) ("[i]n principle, all relations which are recognized in a society as involving special trust should be kept secure from the corrupting influence of bribery"). The proposed Official Draft of the *Model Penal Code* (§ 224.8 (1962)) contained an explicit prohibition against commercial

---

[23] As the Appendix demonstrates, 13 of these state private bribery statutes date back to the nineteenth century. Of the seven states that did not have private bribery statutes in 1961, six have enacted such statutes since 1961. Some of the state bribery statutes prohibit private and official bribery in the same provision. See, *e.g.*, Miss. Code Ann. § 97-11-11 (1973); R.I. Gen. Laws § 11-7-3 (1970); Vt. Stat. Ann. tit. 12, § 1106 (1973).

bribery, generalizing from existing state statutes. See also Note, *Control of Nongovernmental Corruption by Criminal Legislation*, 108 U. Pa. L. Rev. 848 (1960), discussing the extent of state penal legislation in this field.

This survey leaves no doubt that the term "bribery," as used in state and federal criminal statutes in existence in 1961, had a meaning far broader than that at common law. Bribery was not limited to corruption of public officials. Because the Travel Act refers to bribery illegal under state and federal law, the widespread existence of state and federal statutes punishing commercial and other forms of non-official bribery is a strong indication that the Travel Act should have a coextensive reach. Moreover, as we demonstrate below, there is clear evidence in the legislative history of the Travel Act that Congress was aware of the generic meaning currently afforded to the term bribery.

C. The Legislative History Of The Travel Act Demonstrates That Congress Recognized The Generic Meaning Of The Word Bribery

This Court has previously observed that the legislative history of the Travel Act is "limited." *Rewis* v. *United States*, 401 U.S. 808, 811 (1971). The committee reports contain no discussion that elucidates the scope of the term "bribery" as used in the Act. See S. Rep. No. 644, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 966, 87th Cong., 1st Sess. (1961). The hearings on the legislation were extensive, however, and provide insights into the assumptions of its proponents. See *United States* v. *Nardello, supra*, 393 U.S. at 290-291.

The hearings before the House and Senate Judiciary Committees on the Travel Act and its companion legislation are replete with references to use by criminals of non-official bribery. For example, Attorney General Kennedy's testimony before the House Committee on one of the companion bills expressed grave concern about "gamblers [who] have bribed college basketball players to shave points on games." *Legislation Relating to Organized Crime: Hearings on H.R. 468, H.R. 1246, etc., Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 25 (1961) ("*House Hearings*"). The Attorney General's testimony was also made a part of the record of the Senate hearings. *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, etc., Before the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 6 (1961) ("*Senate Hearings*"). In those same hearings, Attorney General Kennedy referred to labor union corruption as a form of "bribery." See *Senate Hearings* at 15. See also *House Hearings* at 84, where Rep. Foley described corruption of labor leaders as "pure bribery"; see also *id.* at 312 (similar remarks of Chairman Celler) and 319-320.[24] Of still greater significance, Senator

[24] These remarks were entirely consistent with the prevailing judicial view that the corruption of labor union officers was a form of "bribery." See *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959).

Keating, in a colloquy with a representative of the Department of Justice, described the evils of sports bribery and noted that the Travel Act could be applied to such practices "if you could prove item of travel with intent." *Senate Hearings* at 327.[25]

The legislative history surrounding 18 U.S.C. 224, the 1964 enactment forbidding bribery in sporting events (described on pages 25-26, *supra*), confirms that Congress believed that the Travel Act was applicable to forms of bribery other than official bribery. The assumption in passing the sports bribery statute was that the Travel Act already applied to sports bribery if a state statute was infringed and the interstate nexus was satisfied. Because not all states had adopted such statutes, however, Congress deemed it necessary to enact a general federal prohibition against sports bribery. But the understanding that the Travel Act would also apply if an existing state statute was violated was clearly stated. See S. Rep. No. 593, 88th Cong., 1st Sess. 3-5 (1963) ("section 1952 of title 18 would apply to sporting events bribery effected through interstate commerce only when the bribe occurred in a State which has laws proscribing sporting events bribery. The existing law accordingly covers this situation only partially * * *.") See also *id.* at 5 (letter of Deputy Attorney

[25] As an active proponent of the Travel Act (see, *e.g.*, 107 Cong. Rec. 13943 (1961)), Senator Keating's understanding of the law is relevant. Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203 (1976); *Simpson* v. *United States*, 435 U.S. 6, 13-14 (1978).

General White stating that the Travel Act "would apply at present to sports events bribery" if a state sports bribery statute was infringed). Although this subsequent legislative history is, of course, not controlling, and "cannot serve to change the legislative intent" of a prior Congress (*Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 734 n.14 (1977)), it is entitled to consideration because it is consistent with the literal text of the Travel Act, does not conflict with prior legislative views, and was generated by a committee of Congress only two years later during the enactment of a related statute. See generally *Reiter* v. *Sonotone Corp.*, No. 78-690 (June 11, 1979), slip op. 10 n.7; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969).

In sum, although the legislative history does not explicitly state that the Travel Act was intended to encompass "commercial bribery," the materials cited above confirm that Congress understood the term "bribery" in its contemporary sense—as a generic description of corrupt payments to induce a breach of duty, applicable in contexts other than cases of official corruption.[26] That understanding provides di-

[26] The legislative history is not without reference, of course, to "official" bribery, in addition to the other forms of bribery to which we have referred. See *United States* v. *Brecht*, *supra*, 540 F.2d at 50 n.9. But this is entirely consistent with the view that Congress used the term "bribery" generically. Official bribery is a category of bribery of obvious importance to law enforcement efforts, and it certainly is cov-

rect support for the decision below, which interpreted the language of the statute in its generic sense and declined to introduce an unwritten limitation confining the statute to "official bribery." [27]

D. This Court's Decision In *United States* v. *Nardello* Confirms The Appropriateness Of A Generic Interpretation Of The Word Bribery

Because Congress has prohibited bribery generally, without limitation to a particular sub-category, and because it has given no indication that the statutory language should be limited to its common law definition, the court of appeals correctly concluded that *United States* v. *Nardello*, 393 U.S. 286 (1969), provides the governing rule of statutory interpretation. In *Nardello*, this Court considered the scope of the word "extortion," which appears in conjunction with "bribery" in the Travel Act. 18 U.S.C. 1952 (b) (2). The question was whether extortionate con-

---

ered by the Travel Act. Nothing in the legislative history suggests, however, that official bribery is the *sole* category of bribery intended to be prohibited.

[27] See Miller, *The "Travel Act": A New Statutory Approach to Organized Crime in the United States*, 1 Duq. L. Rev. 181, 196 (1963) (footnote omitted): "Any extortion or bribery in violation of State or Federal law is enough." In illustrating the broad scope of the Travel Act, Miller lists several commercial bribery statutes that can trigger a Travel Act prosecution. *Id.* at 196 n.60. The author of this article was an Assistant Attorney General in charge of the Criminal Division of the Department of Justice, who testified extensively before the congressional committees that considered the Travel Act. See *House Hearings* at 335-378; *Senate Hearings* at 102-114, 243-329.

duct denominated as "blackmail" by state law should be treated as "extortion" within the scope of the Travel Act. The defendant contended that, at common law, the term "extortion" was limited to action by "public officials" and that the Travel Act should be limited accordingly. 393 U.S. at 289-290, 292-293. This Court rejected that contention, finding no language limiting the statute to official action (*id.* at 293, 296) and noting that blackmail by private parties is a variety of conduct "generally known as extortionate since money was to be obtained from the victim by virtue of fear and threats of exposure." The Court declined to give the term "extortion" the "unnaturally narrow reading" urged by the defendant, concluding that the Act's coverage is "generic" (*id.* at 296).[28] See also *United States* v. *Turley*, 352 U.S. 407, 411-417 (1957), holding that the term "stolen" appearing in the National Motor Vehicle Theft Act, 18 U.S.C. 2312, is not limited to takings that amount

---

[28] *Nardello* establishes that the label that a state attaches to conduct falling within the generic meaning of the terms used in the Travel Act is not controlling. "We therefore conclude that the inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the extortionate activity charged." 393 U.S. at 295. Thus, conduct labelled as "blackmail" under state law is punishable if it falls within the generic definition of "extortion" contained in the Travel Act. *Id.* at 295-296. Similarly, conduct labelled as "corruption" under state statute would be covered by the Travel Act if it fell within the generic meaning of "bribery." In the present case, no such question is presented, since Louisiana law designates petitioner's conduct as commercial "bribery." See page 3, *supra*.

to common law larceny, but includes all takings of motor vehicles with the intent to deprive the lawful owner of the rights of ownership: "We conclude that the Act requires an interpretation of 'stolen' which does not limit it to situations which at common law would be considered larceny" (*id.* at 417).[29]

While the court below (Pet. App. A-9 to A-10) found that *Nardello* presents "a ready parallel to the case at bar," as did the Fourth Circuit in *United States* v. *Pomponio*, *supra*, 511 F.2d at 956-957,[30] the Second Circuit concluded in *United States* v. *Brecht*, *supra*, 540 F.2d at 48, that *Nardello* is distinguishable because this Court had noted (393 U.S. at 293 n.11) that bribery "traditionally focused upon corrupt

[29] As *Turley* recognizes (352 U.S. at 411), it is sometimes appropriate to look to the common law as an aid in construing undefined terms in criminal statutes. But this canon of construction, like all other "generalized axioms of experience in construing legislation" (*United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)), is but a guide, not an absolute. The common law is not definitive where, as here, a statutory term has an accepted generic meaning (both in legal and popular usage) and the generic meaning is supported by the legislative history of the statute and is most consistent with the congressional purpose. See *United States* v. *Cook*, 462 F.2d 301, 303 (D.C. Cir. 1972); see also *NLRB* v. *Hearst Publications*, 322 U.S. 111, 124-125 (1944).

[30] *Pomponio* held that the Travel Act covers bribery directed toward a bank officer, in violation of state and federal commercial bribery statutes. The court noted that "while the states and the federal government have enacted statutes dealing with the corruption of public officials, they have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel Act." 511 F.2d at 956.

activities by public officials." This is of course true, but the same could be said of extortion (see 393 U.S. at 289), yet the Court refused to limit that term in the Travel Act to its common law definition. Here, as in *Nardello*, the broad scope of the statute, the absence of any reference or restriction to official action in the Act's language or legislative history, and (as we discuss below) the explicit congressional "design[] to stem the 'clandestine flow of profits'" to organized crime (*id.* at 292), strongly support the view that "bribery," like "extortion," should be given a generic interpretation. See *United States* v. *Dansker*, 537 F.2d 40, 47 (3d Cir. 1976) ("The Travel Act does not reach only those state offenses which would have constituted the crimes of 'extortion, bribery, or arson' at common law. Rather, all state offenses which can be generically classified under those headings fall within its purview"); see also *United States* v. *Michael*, 456 F. Supp. 335, 346-349 (D.N.J. 1978). To adopt the limiting construction urged by petitioner "would carve a substantial slice" from the coverage of the statute, a step that is not appropriate without "an affirmative indication * * * that Congress so intended." *Erlenbaugh* v. *United States*, *supra*, 409 U.S. at 247.

The Louisiana statute underlying petitioner's Travel Act conviction prohibits "commercial bribery," which it defines as "the giving or offering to give * * * anything of * * * value to any private agent, employee, or fiduciary, without the knowledge and consent of the principal or employer, with the intent

to influence such agent's, employee's, or fiduciary's action in relation to the principal's or employer's affairs." La. Rev. Stat. § 14:73. This statute clearly designates conduct falling within the generic definition of bribery, and petitioner's conviction under the Travel Act was therefore properly sustained.

E. Interpreting The Travel Act To Encompass Commercial Bribery Would Not Conflict With The Purposes Sought To Be Achieved By Congress

Relying on the Second Circuit's opinion in *United States* v. *Brecht*, *supra*, 540 F.2d at 50, petitioner contends that application of the Travel Act to commercial bribery would be inconsistent with the purposes sought to be achieved by Congress (Br. 6, 8-14). As noted in *Brecht*, the Travel Act was aimed primarily at illegal activities of "organized crime." Adopting that premise, the *Brecht* court reasoned that commercial bribery does not fall within the ambit of the Act because it "typically is not a feature of organized crime," but rather " 'is typically an establishment transgression' " (540 F.2d at 50, quoting *United States* v. *Niedelman*, 356 F.Supp. 979, 982 (S.D.N.Y. 1973)). Judge Rubin, dissenting in the court below, also expressed doubt regarding the extent to which organized criminals engage in commercial bribery (Pet. App. A-20).

Although it is correct to assert that the Travel Act was aimed primarily at organized crime, it is incorrect to conclude that "commercial bribery" is not a "feature of organized crime." To the contrary, organized crime is and historically has been

involved in commercial bribery on an extensive basis, using it as a key weapon to infiltrate legitimate businesses and to derive substantial revenues. The important purposes Congress sought to achieve through the Travel Act would therefore be severely undermined if such bribery were immunized from its sanctions.

As the Court observed in *United States* v. *Nardello*, *supra*, 393 U.S. at 291-292, 295, the Travel Act was "primarily designed to stem the 'clandestine flow of profits' " to criminals, by depriving them of the use of the facilities of interstate commerce in carrying on a broad spectrum of illegal activities. See also H.R. Rep. No. 966, 87th Cong., 1st Sess. 2-3 (1961); S. Rep. No. 644, 87th Cong., 1st Sess. 3-4 (1961). The victims of illegal activities of organized crime, as *Nardello* also noted, are often business firms. 393 U.S. at 291 n.8, 295 n.13.[31] In 1965, Congress amended the Travel Act to include "arson," in addition to "extortion" and "bribery," within the coverage of the Act. See *id.* at 291 n.8. The committee reports that accompanied that amendment emphasized once again the need to fight organized criminals by "exhausting their sources of illegal funds" and re-

---

[31] By separately enumerating certain offenses (such as "bribery") in Section 1952(b)(2) of the Act, Congress made it clear that such offenses—whether or not a part of a "business enterprise" within the meaning of Section 1952(b)(1)—are forbidden. Congress was concerned that such acts, even when not a part of a criminal business enterprise, could provide "sources of income for organized crime." *United States* v. *Nardello*, *supra*, 393 U.S. at 291-292.

ducing their "spheres of influence." S. Rep. No. 351, 89th Cong., 1st Sess. 3 (1965). The Senate Report also noted, quoting from the views of the Attorney General, that "[t]he success of the Government's war against crime syndicates depends in part on the termination of their primary sources of illegal revenue." *Id.* at 4. See also H.R. Rep. No. 264, 89th Cong., 1st Sess. 1-4 (1965).

Permitting criminals to engage in schemes of commercial bribery through use of the facilities of interstate commerce would be wholly inconsistent with the congressional purpose to dry up the sources of revenue that are available to them. The infiltration of organized crime into legitimate business is now well documented, as is the fact that organized crime uses dishonest methods to obtain influence over its business victims and to compete with other business firms. See, *e.g.*, S. Rep. No. 141, 82d Cong., 1st Sess. 34 (1951) (Kefauver Report); S. Rep. No. 307, 82d Cong., 1st Sess. 170 *et seq.* (1951); S. Rep. No. 1139 (Part 3), 86th Cong., 2d Sess. 508-509 (1960) (McClellan Report); S. Rep. No. 1139 (Part 4), 86th Cong., 2d Sess. 856 (1960); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 4-5 (1967); H.R. Rep. No. 1574, 90th Cong., 2d Sess. 74 (1968). The use by organized crime of commercial and other forms of non-official bribery to conduct profitable criminal ventures is equally well documented. See, *e.g.*, S. Rep. No. 307, *supra*, at 160-161 (bribery of athletes in connection with gambling activities); S.

Rep. No. 1139 (Part 4), *supra*, at 772 (bribery of bank officers). Hearings focusing on the techniques used by organized crime to infiltrate business firms have clearly established that commercial bribery is a highly effective and frequently used strategy. See *Organized Crime, Stolen Securities: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. 675-683 (1971) (describing the widespread use of commercial bribery to steal securities from brokerage houses and pledge them with banking institutions); *Organized Crime, Techniques for Converting Worthless Securities into Cash: Hearings Before the House Select Comm. on Crime*, 92d Cong., 1st Sess. 3, 242, 292-293, 297, 361 (1971) (describing the use by racketeers of commercial bribery to corrupt the president of an insurance company and sell worthless securities to the company); *Organized Crime, Securities: Thefts and Frauds: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 93d Cong., 1st Sess. 183, 239, 240, 467, 475-476 (1973) (describing commercial bribery used by organized criminals to corrupt certified public accountants and employees in financial institutions).[32]

---

[32] Recent studies have also focused on the extent to which organized crime uses commercial and other forms of non-official bribery. See R. Kennedy, *The Enemy Within* 97-100, 216-217 (1960) (bribery of labor officials); Johnson, *Organized Crime: Challenge to the American Legal System*, 53 J. Crim. L. C. & P. S. 399, 411-412 (1962) (bribery of athletes); McKeon, *The Incursion by Organized Crime Into*

The extent of commercial bribery has been described by the United States Chamber of Commerce as "pervasive." See *White Collar Crime* 15 (1974). The Chamber of Commerce estimates that commercial bribery, payoffs and kickbacks cost American business $3 billion annually. *Id.* at 6.

In short, commercial bribery is one of the most effective strategies available to organized crime to infiltrate legitimate business and to earn illicit profits. The financial rewards attainable from corrupt activities in the commercial context are obvious and well documented. Indeed, there is no reason to infer that the involvement of organized crime in commercial bribery is any less extensive than its involvement in official bribery. Due to the financial incentives involved, the inference to be drawn is quite the opposite. We submit that it would be anomalous to interpret the Travel Act, which was intended to deprive organized crime of the means of producing illegal revenues, to prohibit arson and extortionate practices injurious to business firms, while permitting organized crime to use the facilities of interstate

---

Legitimate Business, 20 J. Pub. L. 117, 139-140 (1971) (bribery of cargo handlers to assist in theft of valuable cargo); T. Clark and J. Tigue, *Dirty Money* 92, 133, 171, 180-181, 196 (1975) (bribery of employees in banks and brokerage firms); A. Bequai, *Computer Crime* 1, 4, 9, 19 (1978) (bribery of computer programmers). The most extensive study of the use of organized crime of commercial bribery is J. Kwitny, *Vicious Circles: The Mafia in the Marketplace* 5-46, 94-99, 202, 205, 210, 241-246 (1979) (describing organized crime's use of commercial bribery in a broad spectrum of industries).

commerce to commit commercial bribery. Such an interpretation would frustrate the intent of Congress in enacting the statute.[33]

F. The Travel Act Does Not Require That A Defendant Have A Demonstrated Relationship With Organized Crime

1. Petitioner also contends, in reliance on Judge Rubin's dissenting opinion in the court of appeals (Pet. App. A-22), that he was not proven to be a member of organized crime and that the statute is therefore inapplicable to him (Br. 8, 15). That contention is also meritless. Although, as noted above, the Travel Act was intended to prohibit criminal schemes frequently associated with organized crime, it contains no requirement that a particular defendant be shown to have an affiliation with organized crime. The statute states unequivocally that "[*w*]*hoever* travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce" for the purposes forbidden by the statute is guilty of

---

[33] If petitioner's proposed construction of the statute were correct, organized criminals, based in New York, could operate a scheme to bribe employees of a stock brokerage firm in Chicago, or a bank in Miami Beach, causing extensive financial injury to those businesses and enriching the syndicate. Due to the interstate nature of the scheme, local authorities would not be empowered to investigate or prosecute the offenders effectively. The very evils that Congress intended to eliminate in 1961 would go without remedy. Such a construction would be inappropriate for, as noted in *United States* v. *Nardello*, *supra*, 393 U.S. at 292, "[t]he legislative response was to be commensurate with the scope of the problem."

a violation. 18 U.S.C. 1952(a) (emphasis supplied).[34] See generally *United States* v. *Nardello*, *supra*, 393 U.S. at 293, rejecting the argument that the statute applies only to certain categories of persons who violate its provisions: "§ 1952 imposes penalties upon any individual crossing state lines or using interstate facilities for any of the statutorily enumerated offenses." Thus, although the statute was primarily aimed at prohibiting illegal activities commonly associated with organized criminals, its coverage is general: anyone engaging in the conduct prohibited by the Act is subject to its sanctions.

The Court recently rejected an argument identical to petitioner's contention in *United States* v. *Culbert*, 435 U.S. 371 (1978). There, the Court held that the general prohibition of extortion contained in the Hobbs Act (18 U.S.C. 1951) does not require the government to prove that a particular defendant's conduct constituted "racketeering," even though prevention of racketeering was a central purpose of that statute. The Court noted that "racketeering" is not an element of the offense and is not defined by the statute. Although Congress "was very concerned about racketeering activities" when it passed the statute (435 U.S. at 374), it "did not intend to make

[34] Although the title of the statute refers to interstate travel in aid of "racketeering enterprise," that summary reference does not purport to detract from the general scope of the statute. See, *e.g.*, *United States* v. *Archer*, 486 F.2d 670, 680 (2d Cir. 1973); *Fraser* v. *United States*, 145 F.2d 139, 142 (6th Cir.), cert. denied, 324 U.S. 849 (1944). See also *Erlenbaugh* v. *United States*, *supra*, 409 U.S. at 247 n.21.

racketeering a separate, unstated element of an Anti-Racketeering Act violation" (*id.* at 376). Accordingly, the Hobbs Act was interpreted "to make punishable all conduct falling within the reach of the statutory language" (*id.* at 377). In reaching that conclusion, the Court emphasized the substantial vagueness problems that would result if an undefined element of "racketeering" were judicially implied (*id.* at 374).

Culbert is dispositive of petitioner's claim that the Travel Act requires the government to prove that he was a member of organized crime. As in the case of the Hobbs Act, no such element is prescribed by the Travel Act, and any attempt to imply such an element would lead to serious vagueness problems. This case illustrates the difficulties that would result. The evidence at trial showed that petitioner engaged in a well-organized conspiracy, involving several members, to steal commercial data through bribery. The plan involved the use of interstate facilities and a potential investor with an extensive past criminal record. The sophisticated enterprise was intended to operate through a corporation and was expected to yield substantial revenues. See pages 5-9, *supra*. Thus, the enterprise had many indicia of criminal "organization." Petitioner nonetheless argues, without elaboration, that the scheme cannot be equated with "organized crime." Clearly, the statute provides no basis for deciding whether or not the enterprise meets such an undefined standard. Here, as in *Culbert*, there is no statutory definition or requirement of

proof of organized criminal activity, and no such element should be engrafted on the statute.[35]

2. Petitioner also raises the related claim (Br. 8-9) that extension of the Travel Act to acts of commercial bribery without a proven association with organized crime could result in prosecution of insignificant offenses and would expand the jurisdiction of the federal government over state offenses. See also *United States* v. *Brecht*, *supra*, 540 F.2d at 49. However, there is no question here of applying the statute to an insignificant criminal enterprise. As noted above, petitioner participated in a well organized criminal scheme that was expected to yield substantial profits from petroleum exploitation and that involved numerous sophisticated participants. Moreover, there is no reason to infer that commercial bribery is inherently more likely to involve insignificant misconduct than official bribery, which is concededly covered by the Act. Official bribery can involve the payment of a small bribe to a police officer just as commercial bribery can involve a small payment to a purchasing agent. The Department of Justice would not ordinarily expend its limited re-

[35] See also *United States* v. *Peskin*, 527 F.2d 71, 76-77 (7th Cir. 1975); *United States* v. *Phillips*, 433 F.2d 1364, 1367 (8th Cir. 1970), cert. denied, 401 U.S. 917 (1971); *United States* v. *Roselli*, 432 F.2d 879, 885 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971), holding that the Travel Act is not limited to offenses committed by members of organized crime.

sources in the prosecution of such cases under the Travel Act.[36]

Petitioner's argument (Br. 9) that the Travel Act, as construed by the court below, will embrace offenses already prohibited under state law and will involve the federal government in the prosecution of local criminal activities with interstate ramifications is true, but irrelevant. The Travel Act was clearly intended to have that effect. It explicitly applies to bribery schemes illegal under federal *or* state law. As this Court has repeatedly noted, "the purpose of the Travel Act was to aid local law enforcement officials." *United States* v. *Nardello*, *supra*, 393 U.S. at 290. The Travel Act was part of "a comprehensive federal legislative effort to assist local authorities in dealing with organized criminal activity which, in many instances, had assumed interstate proportions and which in all cases was materially assisted in its operations by the availability of facilities of interstate commerce." *Erlenbaugh* v. *United States*, *supra*, 409 U.S. at 245. See also *id.* at 247 n.21. Accord, *United States* v. *Culbert*, *supra*, 435 U.S. at 379: "With regard to the concern about disturbing the federal-state balance, moreover, there is no question that Congress intended to define as a federal

[36] Should a trial court conclude that the misconduct involved in a particular Travel Act prosecution is relatively insignificant or that mitigating circumstances surround the offense, it is vested with discretion to adjust the penalty to meet the circumstances of the case. In the present case, the district court imposed a substantial prison term on co-defendants Levy and LaFont, but it gave petitioner a suspended sentence.

crime conduct that it knew was punishable under state law." [37]

Petitioner's argument that the Travel Act unfairly enhances the penalties applied by states to commercial bribery offenses is equally insubstantial. The Travel Act refers, in part, to state statutes to determine whether a violation has occurred. However, Congress has prescribed its own penalties, based on the use of interstate facilities to promote the illegal enterprise. Congress undoubtedly has the power to prescribe penalties that attach to offenses affecting interstate commerce, regardless of whether the states attach different penalties to local offenses. See, *e.g.*, *United States* v. *Brecht*, *supra*, 540 F.2d at 50; *United States* v. *Brennan*, 394 F.2d 151, 153 (2d Cir.), cert. denied, 393 U.S. 839 (1968); see generally *Smith* v. *United States*, 431 U.S. 291, 307 (1977); *Kentucky Whip & Collar Co.* v. *I.C.R. Co.*, 299 U.S. 334, 346-347 (1937).

---

[37] Contrary to petitioner's assertion (Br. 7), *Rewis* v. *United States*, 401 U.S. 808 (1971), does not suggest that application of the Travel Act to commercial bribery would upset the federal-state balance. *Rewis* dealt with the sufficiency of the interstate nexus in a prosecution focused on a local gambling establishment with certain out-of-state patrons. This Court held that operation of a local gambling business with patrons from out of state would not, without more, constitute a sufficient use of interstate facilities to infringe the Act. Due to the Court's limited grant of certiorari in the present case, no question concerning the adequacy of the evidence establishing use of interstate facilities is presented for decision.

G. Because The Travel Act Clearly Extends To All Kinds Of Bribery, Including Commercial Bribery, The Rule Of Lenity Does Not Support A Narrow Construction

Petitioner's final contention (Br. 8) is that his conviction should be reversed pursuant to the "rule of lenity." He asserts that the Travel Act's coverage is ambiguous and that the Act must therefore be construed strictly in his favor. See *United States* v. *Brecht*, *supra*, 540 F.2d at 50.

As we have demonstrated above, however, the literal language of the statute applies to petitioner's offense. He was convicted of facilitating bribery under a statute that focuses on bribery generically, without limitation on its category. Moreover, the legislative history supports the Travel Act's plain meaning. Under these circumstances, the rule of strict construction does not require a narrow interpretation: " 'The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one * * *.' " *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943).

Similarly, because the ambit of the Travel Act can be ascertained with reasonable certainty, the rule of lenity does not support petitioner's claim. See *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977) (the rule of lenity is only applicable when " '[a]fter seizing every thing from which aid can be derived * * * we are left with an ambiguous statute * * *' ").

See also *Barrett* v. *United States*, 423 U.S. 212, 217-218 (1976) ("There is no occasion here to resort to a rule of lenity * * * for there is no ambiguity that calls for a resolution in favor of lenity. A criminal statute, to be sure, is to be strictly construed but 'it is not to be construed so strictly as to defeat the obvious intention of the legislature' "). Accord, *United States* v. *Culbert*, *supra*, 435 U.S. at 379; *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 10; *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7.[38]

In sum, the Travel Act, literally read, extends to the offense for which petitioner was convicted, and nothing in the legislative history suggests that the Act should be construed in the narrow fashion that he urges. The rule of lenity thus provides no basis for reversing his conviction.

---

[38] Considerations of fairness do not weigh in favor of petitioner's assertion of the rule of lenity. Petitioner recognized that his conduct was wrongful at the time that it occurred (see pages 8-9, *supra*). He had clear notice that commercial bribery was illegal under the Louisiana criminal statute that triggered application of the Travel Act. And, prior to the time that he engaged in the scheme to commit commercial bribery, this Court had confirmed that the words in the Travel Act should receive a generic interpretation (*United States* v. *Nardello*, *supra*). Moreover, the only court of appeals to have ruled upon the precise question presented here had held that the Travel Act covered commercial bribery (*United States* v. *Pomponio*, *supra*). Hence, this is not a case in which petitioner was "forced to speculate * * * whether his conduct is prohibited." *Dunn* v. *United States*, No. 77-694 (June 4, 1979), slip op. 12.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

JAMES ROLAND DIFONZO
Attorney

JULY 1979

APPENDIX A

PRIVATE BRIBERY STATUTES ENACTED BY 1961

State	Type of Bribery Prohibited	Original Enactment	Current Codification
Alabama	Sports	1947 Ala. Acts, No. 253 at 107	ALA. CODE tit. 13, § 13-4-9
Alaska	Telegraph Agent	ALASKA CODE (1900) § 172	ALASKA STAT. § 42.20.110
Arizona	Alcoholic Beverages	1939 Ariz. Sess. Laws, ch. 64, § 12 at 185	ARIZ. REV. STAT. § 4-243
	Sports	1949 Ariz. Sess. Laws, ch. 61, § 12 at 124	ARIZ. REV. STAT. § 13-2309
Arkansas	Sports	1951 Ark. Acts, No. 250 at 585	ARK. STAT. ANN. § 41-3288
	Banking	1913 Ark. Acts, No. 113, § 24 at 476	ARK. STAT. ANN. § 67-707
California	Sports	1921 Cal. Stats., ch. 54, at 62	CAL. PENAL CODE §§ 337b-e (West)
	Telegraph Agent	CAL. PENAL CODE § 641 (1872)	CAL. PENAL CODE § 641 (West)
	Banking	1909 Cal. Stats., ch. 76, § 39 at 97	CAL. FIN. CODE § 3350 (West)
Colorado	Sports	1947 Colo. Sess. Laws, ch. 171 at 380	COLO. REV. STAT. § 18-5-403
	Telegraph Agent	1877 Colo. Sess. Laws, ch. 23, § 781, at 312	COLO. REV. STAT. § 40-17-8
Connecticut	Sports	1947 Conn. Pub. Acts, No. 19[illegible] at 159	CONN. GEN. STAT. ANN. §§ 53-287, 53-288 (West)
Delaware	Sports	46 Del. Laws (1947), ch. 231 at 629	DEL. CODE tit. 28, §§ 701-704
Florida	Sports	1953 Fla. Laws, ch. 28024 at 143	FLA. STAT. § 838.12
Hawaii	Sports	1947 Haw. Sess. Laws, ch. 186 at 385	HAW. REV. STAT. § 725-7

PRIVATE BRIBERY STATUTES ENACTED BY 1961 (Continued)

State	Type of Bribery Prohibited	Original Enactment	Current Codification
Illinois	Sports	1921 Ill. Laws at 400	ILL. REV. STAT. ch. 38, §§ 29-1 to 29-3
Indiana	Common Carrier	1907 Ind. Acts, ch. 120 at 192	IND. CODE §§ 10-604, 10-605
	Sports	1947 Ind. Acts, ch. 17 at 64	IND. CODE §§ 10-606, 10-607
Iowa	Sports	1953 Iowa Acts, ch. 254 at 332	IOWA CODE ANN. § 722.3 (West)
Kentucky	Alcoholic Beverages	1938 Ky. Acts, ch. 2, § 113 at 48	KY. REV. STAT. ANN. § 244.600 (Bobbs-Merrill)
	Sports	1952 Ky. Acts, ch. 1 at 1	KY. REV. STAT. ANN. §§ 436.505, 436.506 (Bobbs-Merrill)
Louisiana	Commercial	1920 La. Acts, No. 108, §§ 1-10	LA. REV. STAT. ANN. § 14:73 (West)
	Sports	1952 La. Acts, No. 279 at 732	LA. REV. STAT. ANN. § 14:118.1 (West)
Maine	Labor	1880 Me. Acts, ch. 200, § 4 at 202	ME. REV. STAT. tit. 17, § 3601
Maryland	Sports	1947 Md. Laws, ch. 67 at 84	MD. CRIMES AND PUNISHMENTS CODE ANN. art. 27, §§ 24, 25
Massachusetts	Sports	1947 Mass. Acts, ch. 405 at 386	MASS. GEN. LAWS ANN. ch. 271, § 39A (West)
Michigan	Sports	1921 Mich. Pub. Acts, No. 238 at 451	MICH. STAT. ANN. § 28.319
	Commercial	1905 Mich. Pub. Acts, No. 210 at 307	MICH. STAT. ANN. § 28.320

2a

PRIVATE BRIBERY STATUTES ENACTED BY 1961 (Continued)

State	Type of Bribery Prohibited	Original Enactment	Current Codification
Minnesota	Sports	1947 Minn. Laws, ch. 57 at 75	MINN. STAT. ANN. § 609.825 (West)
Mississippi	Commercial	MISS. CODE (1857), ch. 64, art. 34 at 578	MISS. CODE ANN., §§ 97-11-11, 97-11-13
	Sports	1954 Miss. Laws, ch. 232 at 258	MISS. CODE ANN., § 97-29-17
Missouri	Sports	1921 Mo. Laws at 283	MO. ANN. STAT. § 570.155 (Vernon)
Montana	Telegraph Agent	MONT. PENAL CODE (1895) § 1153 at 927	MONT. REV. CODES ANN. § 94-35-221
Nebraska	Commercial	1907 Neb. Laws, ch. 171 at 503	NEB. REV. STAT. § 28-710
	Sports	1947 Neb. Laws, ch. 102 at 289	NEB. REV. STAT. § 28-710.01
Nevada	Labor	1912 Nev. Stats. §§ 6794, 6795 at 1926	NEV. REV. STAT. §§ 614.140, 614.150
	Telegraph Agent	1864 Nev. Stats., ch. 86, § 7 at 125	NEV. REV. STAT. § 707.120
New Jersey	Banking	1913 N.J. Laws, ch. 132 at 212	N.J. STAT. ANN. § 2A:91-1 (West)
	Labor	1911 N.J. Laws, ch. 94 at 133	N.J. STAT. ANN. §§ 2A:93-7 2A:93-8 (West)
	Sports	1945 N.J. Laws, ch. 217 at 722	N.J. STAT. ANN. §§ 2A:93-10, 2A:93-11 (West)
New York	Labor	1904 N.Y. Laws, ch. 659 at 1655	N.Y. PENAL LAW § 180.15 (McKinney)

3a

PRIVATE BRIBERY STATUTES ENACTED BY 1961 (Continued)

State	Type of Bribery Prohibited	Original Enactment	Current Codification
New York (continued)	Sports	1921 N.Y. Laws, ch. 80 at 278	N.Y. PENAL LAW § 180.35 (McKinney)
	Commercial	1905 N.Y. Laws, ch. 136 at 225	N.Y. PENAL LAW § 180.00-180.03 (McKinney)
North Carolina	Sports	1921 N.C. Sess. Laws, ch. 23 at 138	N.C. GEN. STAT. §§ 14-373 to 14-376
	Banking	1903 N.C. Sess. Laws, ch. 275, § 24 at 475	N.C. GEN. STAT. § 14-233
Ohio	Sports	1921 Ohio Laws at 83	OHIO REV. CODE ANN. § 3773.15 (Page) [repealed]
Oklahoma	Sports	1947 Okla. Sess. Law Serv., tit. 21, ch. 10 at 231	OKLA. STAT. ANN., tit. 21, §§ 399, 400 (West)
Oregon	Telegraph Agent	1862 Or. Laws, ch. 54, § 14 at 920	OR. REV. STAT. § 165.515
Pennsylvania	Sports	1939 Pa. Laws, No. 375, §§ 614, 615 at 872	18 PA. CONS. STAT. ANN. § 4109 (Purdon)
	Commercial	1939 Pa. Laws, No. 375, § 667 at 872	18 PA. CONS. STAT. ANN. § 4108 (Purdon)
	Labor	1897 Pa. Laws, No. 130 at 157	18 PA. CONS. STAT. ANN. § 7322 (Purdon)
Rhode Island	Commercial	1881 R.I. Pub. Laws, ch. 864 at 121	R.I. GEN LAWS § 11-7-3, 11-7-4
	Sports	1950 R.I. Pub. Laws, ch. 2556 at 345	R.I. GEN LAWS § 11-7-9, 11-7-10
South Carolina	Commercial	1905 S.C. Acts, No. 467 at 942	S.C. CODE § 16-17-540

PRIVATE BRIBERY STATUTES ENACTED BY 1961 (Continued)

State	Type of Bribery Prohibited	Original Enactment	Current Codification
South Dakota	Architects	1909 S.D. Sess. Laws, ch. 220 at 325	S.D. COMP. LAWS ANN. § 36-18-28
Tennessee	Commercial	1909 Tenn. Acts, ch. 179 at 633	TENN. CODE ANN. §§ 39-821, 39-822
	Sports	1921 Tenn. Commercial Acts, ch. 138 at 368	TENN. CODE ANN. §§ 39-824 to 39-826
Texas	Attorneys	TEX. PENAL CODE (1857) arts. 302-303 at 56	TEX. PENAL CODE ANN. tit. 7, § 32.43 (Vernon)
	Sports	1947 Tex. Gen. Laws, ch. 427 at 1009	TEX. PENAL CODE ANN. tit. 7, § 32.44 (Vernon)
Utah	Telegraph Agent	UTAH COMP. LAWS (1876) § 2209 at 646	UTAH CODE ANN. § 76-9-403
Vermont	Commercial	1904 Vt. Acts, No. 154 at 210	VT. STAT. ANN. tit. 13, § 1106
Virginia	Sports	1960 Va. Acts, ch. 358 at 488	VA. CODE §§ 18.2-442, 18.2-443
Washington	Telegraph Agent	WASH. CODE (1881) § 2348 at 405	WASH. REV. CODE ANN. § 9.73.010
	Sports	1921 Wash. Laws, ch. 181, § 1 at 716	WASH. REV. CODE ANN. §§ 67.04.010 to 67.04.080
	Labor	1909 Wash. Laws, ch. 249, § 425 at 1025	WASH. REV. CODE ANN. §§ 49.44.020, 49.44.030
West Virginia	Sports	1945 W. Va. Acts, ch. 45 at 223	W. VA. CODE § 61-10-22
Wisconsin	Commercial	1905 Wis. Laws, ch. 129 § 1 at 199	WIS. STAT. ANN. § 134.05 (West)
	Sports	1945 Wis. Laws, ch. 339 at 516	WIS. STAT. ANN. § 945.08 (West)

APPENDIX B

PRIVATE BRIBERY STATUTES ENACTED SINCE 1961 IN STATES WHICH PREVIOUSLY HAD NO SUCH LEGISLATION

State	Type of Bribery Prohibited	Original Enactment	Current Codification
Georgia	Sports	1968 Ga. Laws, No. 1157 at 1249	GA. CODE ANN. §§ 26-2711, 26-2712
Kansas	Commercial	1969 Kan. Sess. Laws, ch. 180, § 21-4405	KAN. CRIM. CODE & CODE OF CRIM. PROC. § 21-4405 (Vernon)
	Sports	1969 Kan. Sess. Laws, ch. 180, § 21-4406	KAN. CRIM. CODE & CODE OF CRIM. PROC. § 21-4406 (Vernon)
New Hampshire	Commercial	1971 N.H. Laws, ch. 518 at 666	N.H. REV. STAT. ANN. § 638:7
	Sports	1971 N.H. Laws, ch. 518 at 667	N.H. REV. STAT. ANN. § 638:8
New Mexico	Sports	1963 N.M. Laws, ch. 303 at 876	N.M. STAT. ANN. § 40A-19-13
North Dakota	Sports	1973 N.D. Sess. Laws, ch. 116, § 12 at 247	N.D. CENT. CODE § 12.1-12-07
	Commercial	1973 N.D. Sess. Laws, ch. 116, § 12 at 248	N.D. CENT. CODE § 12.1-12-08
Wyoming	Sports	1963 Wyo. Sess. Laws, ch. 159, § 1	WYO. STAT. §§ 6-9-301 to 6-9-307

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 296270 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-959

VINCENT R. PERRIN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

LEWIS A. KORNHAUSER
New York University
School of Law
40 Washington Sq. South
New York, N.Y. 10012

ROBERT G. HAIK
4616 Jefferson Highway
Metairie, La.

PERRIN C. BUTLER
Suite 1215
144 Elk Place Plaza
New Orleans, La. 70112

IRA J. KURZBAN
KURZBAN & KURZBAN, P.A.
700 Brickell Avenue
Suite 901
Miami, Florida 33131

LEONARD B. BOUDIN
RABINOWITZ, BOUDIN, STANDARD
KRINSKY & LIEBERMAN
30 East 42nd Street
New York, N.Y. 10017

ALBERT J. AHERN, JR.
One Skyline Place
5205 Leesburg Pike
Bailey's Crossroads,
Virginia 22041

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-959

VINCENT R. PERRIN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

Summary of Argument

The crux of the argument presented by the United States may be simply stated: the Travel Act uses the term "bribery" in a "generic" sense which encompasses commercial bribery. The Government's argument in support of this proposition is flawed in every step.

1. Contrary to the Government's position articulated at pages 21-28 of Respondent's brief, the accepted legal usage of the term bribery, both today and at the date of enactment, encompassed only gifts of money or of other benefits to corrupt persons holding public office or, more recently, charged with a public trust. This usage can be traced from the common law origins of the crime in Lord Coke's time

through the Congressional pattern of usage of the term in various statutes, through the interpretation of these statutes by the federal judiciary and through the usage of the term in the vast majority of states.

2. *United States* v. *Nardello*, 393 U.S. 286 (1969), is, contrary to the position of the Government, Respondent's brief at pp. 32-36, completely consistent with defining bribery as dealing with the corruption of persons charged with a public trust. *Nardello* decided that, for purposes of the Travel Act, 18 U.S.C. § 1952, the term "extortion" encompassed both common law extortion which made criminal corrupt acts by public officials and common law blackmail which made criminal similar acts by private persons. In *Nardello*, however, this Court relied on the fact that the states and the Congress had long assimilated the two crimes of extortion and blackmail into one. Unlike the assimilation of these crimes, bribery and commercial bribery have consistently been distinguished by Congress and the states. The rationale of the *Nardello* decision requires that we interpret bribery in the Travel Act solely as an offer of money or other benefit to *a person charged with a public trust.*

3. While the legislative history of the Travel Act is not unambiguous, it does evidence a Congressional intent to define bribery traditionally: as a crime directed against the public. The Government's reliance on the legislative history of a subsequent statute, Respondent's brief at pp. 30-31 (hereinafter "Resp. Br."), is misplaced.

4. With the Travel Act Congress sought to address the problem of organized crime and, as the Government fails to realize, to address this problem in a manner consistent with the principles of federalism. To include commercial bribery in the ambit of the Travel Act would interfere with the states' "latitude in the dispatch of [their] own

affairs." *Rizzo* v. *Goode*, 423 U.S. 362 (1976), by forcing states either to leave commercial bribery outside the scope of the criminal sanction, or to invoke the heavy criminal sanctions superimposed by the Travel Act upon the most lenient misdemeanor statute a state might choose to enact.

5. The Government in its discussion of the doctrine of lenity (Resp. Br. at pp. 47-48) fails to note that doctrine's roots in "fundamental principles of due process." *Dunn* v. *United States*, —— U.S. ——, 99 S. Ct. 2190 (1979). Due process requires that citizens have fair notice of the conduct Congress or any other legislature deems criminal. This Court recognizes this requirement not only in the doctrine of lenity but also in the void-for-vagueness doctrine and the rule of *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). These doctrines coalesce in Petitioner's circumstances because the inclusion of commercial bribery within the ambit of the term bribery in 18 U.S.C. § 1952(b) would be contrary to all indications of the meaning of the term petitioner might have had at the time of his conduct. The construction offered by the government is thus vague as applied and imposes a penalty on petitioner *ex post facto.*

ARGUMENT

I.

Congress Intended, in the Travel Act, to Define "Bribery" as an Offer of Money or of Other Benefits to Corrupt a Person Holding Public Office or Charged With a Public Trust.

A. Accepted Legal Usage Today and at the Time of Enactment of the Travel Act Defined "Bribery" as an Offer of Money or Other Benefit to Corrupt a Person Holding Public Office or Charged With a Public Trust.

1. *The Common Law*

Petitioner and Respondent agree that bribery at common law dealt solely with the corruption of public officials, or persons charged with a public trust. *United States* v. *Nardello, supra,* 393 U.S. at 293, n.11 ("[bribery] has traditionally focussed upon corrupt activities by public officials"). When common law bribery evolved to include the corruption of jurors and witnesses, it held closely to its original purpose of insulating the processes of justice from manipulation. Similarly, the evolution of bribery to subsume the corruption of voters insured the legitimacy of the electoral process and thus reaffirmed that the fundamental purpose of bribery was the punishment of those who seek to corrupt public officers. No source cited by Respondents, see Resp. Br. at pp. 21-22, asserts that common law bribery reached beyond the corruption of public officials, witnesses, jurors, or electors. Simply to follow the long-established principle of interpreting undefined terms in criminal statutes according to their common-law meaning would therefore require acceptance of Petitioner's definition of bribery. *United States* v. *Turley,* 352 U.S. 407, 411 (1957) ("where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give the term its common-law meaning").

2. *The Pattern of Congressional Enactments on Bribery*

Examination of other federal statutes concerned with bribery emphatically confirms that Congress intended in the Travel Act to define bribery solely in terms of the corruption of those charged with a public trust.

The codification of federal criminal statutes covering bribery, graft, and conflicts of interest, 18 U.S.C. §§ 201-224, deal almost exclusively with the corruption of persons holding public office or charged with a public trust.[1] As the Government notes, Resp. Br. at p. 25, "bribery" statutes are also scattered throughout the United States Code and a few of these call the corruption of various private persons "bribery". The Government's reliance on these scattered statutes is misplaced. First, each of these statutes

[1] There are two exceptions: (i) 18 U.S.C. § 224 makes criminal bribery in sporting contests but it clearly identifies in subsection (c)(3) the persons subject to corruption. Further, the act was passed subsequent to the passage of the Travel Act. (ii) 18 U.S.C. § 215 makes criminal the receipt of moneys or other gifts by various officers and agents of federally insured financial institutions; it is thus a *graft* statute concerned with the conflict of interest of bankers and *not* a bribery statute. See *United States* v. *Lane,* 464 F.2d 593 (8th Cir. 1972). This is also reflected in the legislative history of the Federal Reserve Act of 1913, the originating legislation for 18 U.S.C. § 215. The House Report concerning the Federal Reserve Act stated:

> In this section it is sought to correct a bad practice, all too prevalent, of paying fees to bank examiners in order that they may make a favorable report upon the condition of the bank; and further to end the illegitimate practice whereby officers of national banks have heretofore profited at the expense of borrowers by charging a commission or brokerage for the obtaining of loans. The extent of these practices cannot be stated, but that they prevail is certain; and it is equally clear that they are opposed to public welfare and to sound banking, besides being wholly at variance with fundamental principles of honorable personal conduct.

House Report No. 69, 63rd Cong., 1st Sess. (1913).

clearly specifies the individuals whose corruption is at issue and hence indicates Congressional awareness that specificity was necessary.

More importantly, the most significant of these statutes address solely the corruption of persons charged with a public trust or holding public office. For instance, the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78 dd-1 *et seq.* (1977) makes criminal payments to foreign officials, to foreign political parties and candidates, and to any intermediaries of these individuals and associations. Similarly, the language of the Racketeer Influenced and Corrupt Practices Act ("RICO"), 18 U.S.C. §§ 1961-1968, an act whose purpose and language coincide with those of the Travel Act, has been interpreted as applying only to the corruption of public officials.[2] In *United States* v. *Dansker*, 537 F.2d 40 (3d Cir. 1976), the Third Circuit overturned a conviction based on commercial bribery because the term "bribery" included only

> conduct which is intended, at least by the alleged briber, as an assault on the integrity of a public office or an official action.

Id. at 48. In *United States* v. *Forsythe*, 560 F.2d 1127 (3d Cir. 1977), the Third Circuit reaffirmed this interpretation of "bribery".[3, 4]

Third, the statutes dealing with corruption of labor union officials, 29 U.S.C. § 186 and of the trustees of pension

[2] RICO defines racketeering as "any act or threat involving . . . robbery, bribery, extortion, . . ." 18 U.S.C. § 1961.

[3] As argued in Petitioner's brief, the Second Circuit has interpreted "bribery" in the Travel Act consistently with the Third Circuit's views of RICO. *United States* v. *Brecht*, 540 F.2d 45 (2d Cir. 1976).

[4] In *United States* v. *Zacher*, 586 F.2d 912 (2d Cir. 1978) the Second Circuit overturned a conviction under 42 U.S.C. § 1396h(b) which prohibits the offer of any money ". . . in connection with the furnishing of such [medicaid] items or service." The Second Circuit construed the term bribery as requiring "the prostitution of a public trust for private gain." *Id.* at 915.

funds, 29 U.S.C. § 1111, represent an expansion of the concept of a person charged with the public trust and thus a limited expansion of the term bribery. These statutes expand the notion of public trust solely to circumstances in which a person serves as a fiduciary to a large number of individuals. In both the union and pension instances one individual represents a large number of other people just as public officials represent the citizenry at large. Such a conception of a holder of a public trust clearly excludes commercial bribery from the ambit of the Travel Act.[5]

[5] The legislative histories of both statutes are devoid of material that indicates Congressional intent to expand the concept of bribery to the typical commercial bribery situation. Much of the debate on § 186 arose over the section's applicability to the United Mine Workers' demand for a health and welfare fund in the work stoppage of 1946. See, *e.g.* 92 Cong. Rec. 4891-4911, 5040-5044 (1946); 93 Cong. Rec. 4678-4680 (1947). The Congressional debates, when they do address the problem of corruption of officials, focus critically on the fact that the object of the corruption is a *representative* with the responsibility of promoting social welfare. 92 Cong. Rec. 5428 (1946) (". . . the vice and evil which could and would arise . . . [if] the employer be allowed to contribute vast sums of money to the men who are supposed to be representing the employees"). Similarly, this Court in construing § 186 has emphasized the representation interest that the statute protects:

> Those members of Congress who supported the amendment were concerned with the corruption of collective bargaining through bribery of employee representatives by employers

Arroyo v. *United States*, 359 U.S. 419, 425-6 (1959). See also *United States* v. *Ryan*, 350 U.S. 299 (1956).

In fact, Congress did not even use the term bribery in 29 U.S.C. § 186:

> It shall be unlawful . . . to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value . . .

29 U.S.C. § 186.

While the House and Senate Reports on Public Law 93-406, to which 29 U.S.C. § 1111 (Section 411) is a part, do not discuss the section at all, 1974 U.S. Code Cong. and Adm. News 4639, the purpose of the Employee Retirement Income Security Act of 1974 is completely consistent with the interpretation offered in the text: §§ 186 and 1111 represent at most a minor extension of the concept "holder of a public trust" to the employees' representative situation.

Fourth, examination of the statutory law of the District of Columbia reveals that Congress has enacted a criminal statute covering bribery of public officials but none covering commercial bribery. D.C. Code § 22-701.

Fifth, when Congress wishes to punish commercial bribery or any of the other conduct that Respondent now wishes to include in a generic definition of bribery, it has always specifically done so:

> Racketeering activity means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or dangerous drugs which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery) * * * ; (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations . . .

18 U.S.C. § 1961(a)[6]

The Government's contention that the pattern of Congressional enactments on bribery reveals an intent to subsume commercial bribery is completely erroneous. On the contrary, the pattern reveals, as the Senate Judiciary Committee itself recognized in its report on S. 1437, the proposed new federal criminal code, that present bribery law subsumes only "the violation of the public servant's duty". *Senate Report 95-605*, 95th Cong., 2nd Sess. 388 (1977).[7]

---

[6] See also S. 1437 and H.R. 6869 and notes 7, 10 *infra*.

[7] This distinction is made even more explicit in the most recent draft of H.R. 6869, the House version of S. 1437. The House Subcommittee on Criminal Justice has proposed a *separate* section for "Bribery and Graft" (§ 1751) which concerns official corruption and a separate subchapter for *nongovernmental bribery* which is expressly limited to bribery of government contractors (§ 2551), labor bribery (§ 2552) and sports bribery (§ 2553). The Subcommittee's version eliminates the Travel Act entirely and makes no provision for commercial bribery. Thus, except for the incorporation of *pre-existing, specific* nongovernmental bribery sections (i.e. labor, sports, and contractors) the Subcommittee's version defines bribery solely as bribery of government officials.

Working Draft of the Subcommittee on Criminal Justice, H.R. 6869, 96 Cong., 1st Sess. (Aug. 24, 1979) at pp. 53-54, 100-103.

3. *State Legislation*

The Government contends that the pattern of state legislation in bribery also indicates that bribery encompasses commercial bribery. Resp. Br. at pp. 27-28. This contention is clearly erroneous.

In the appendix Petitioner has summarized the pattern of "bribery" enactments in the states. In 1961 only thirteen (13) states had commercial bribery statutes while all had bribery statutes addressed to public officials. Furthermore, the crime of commercial bribery was in 1961 and is now generally considered significantly less heinous than that of bribery. Of the thirteen states which had commercial bribery statutes in 1961, twelve treated it less severely than bribery of public officials.[8] Today, thirty states have separate commercial bribery statutes and of those only six treat commercial bribery as severely as bribery of public officials. In addition, the Model Penal Code considers commercial

---

[8] The appendix gathers the relevant statutory information. The thirteen states with commercial bribery statutes in 1961 are Connecticut, Louisiana, Massachusetts, Michigan, Nebraska, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and Wisconsin. Rhode Island is the only state that treated commercial bribery and bribery identically.

We have taken the list of states from Note, *Control of Nongovernmental Corruption by Criminal Legislation*, 108 U. Pa. L. Rev. 848 (1960). The list there differs somewhat from the list in Respondent's appendix. Our research confirms the University of Pennsylvania note. For instance, the Government contends Tennessee had a commercial bribery statute when, in fact, the statute actually condemns only bribery of agents of common carriers.

bribery a misdemeanor in § 224.8 and bribery of public officials a felony in Article 240. A.L.I. Proposed Official Draft, Model Penal Code § 224.8 and Article 240 (1974).

The enforcement of commercial bribery statutes also indicates the failure of commercial bribery statutes to penetrate into the traditional conception of bribery. A district court commented that the Pennsylvania commercial bribery statute was "in a state of innocent desuetude . . . with no record of any conviction for violation of the law." *Conway Import Co.* v. *United States,* 311 F. Supp. 5, 16 (E.D.N.Y. 1969). A survey of commercial bribery statutes found that there have been relatively few state criminal prosecutions of commercial bribery, 1 A.L.R.2d 1350, 1357 (1965); Accord, Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response,* 63 Virginia L. Rev. 1099, 1157 (1977).

The pattern of state legislation and enforcement therefore parallels that of federal legislation and the view of the common law. Bribery in 1961, and today, means the offer of money or of other benefits to persons holding public office or charged with a public trust.

B. This Court's Decision in *United States* v. *Nardello* is Consistent With a Definition of Bribery That Requires the Corrupton of a Public Trust.

The Government contends that *United States* v. *Nardello,* 393 U.S. 286 (1969), substantiates its broad definition of "bribery". Resp. Br. at pp. 32-36. This contention ignores both the language of the *Nardello* opinion and the rationale which underlies it. In a footnote, the *Nardello* Court noted that "[b]ribery has traditionally focussed upon corrupt activities by public officials." 393 U.S. at 293, n.11. More importantly, the *Nardello* court indicated the nature of the investigation to be undertaken when determining the scope of the terms in the Travel Act. In its analysis of "extortion", the *Nardello* court rested its finding of Congressional intent primarily upon an examination of federal and state legislative treatment of the extortion/blackmail distinction. 393 U.S. at 289, 294-295.

The Government has misread this Court's opinion in *United States* v. *Nardello, supra.* The Court, in holding the blackmail equivalent to extortion, ruled that the labels attached by the various states to various crimes did not determine whether they qualified as unlawful activity within the meaning of the Travel Act. Rather, the substance of those crimes would determine the sweep of the Act. The Court then found that the crimes of extortion and blackmail had long been assimilated into one offense.

The evidence on which this Court relied in finding the assimilation of blackmail and extortion was substantial. In footnote 12 of *United States* v. *Nardello, supra,* this Court pointed out that the Pennsylvania cases treated extortion and blackmail as synonymous. It also noted they received synonymous treatment in the federal code; 18 U.S.C. § 250, formerly entitled "Extortion by Informer", is today captioned "Blackmail" under 18 U.S.C. § 873. Both when this Court decided the *Nardello* case and when Congress enacted the Travel Act, all of the states had enacted statutes which made extortion and blackmail cover actions of private as well as public parties. Congress thus intended that the Travel Act reach extortionate behavior of both public and private officials regardless of the label a state chose to denominate the criminal offense.

Neither the states nor Congress, however, have assimilated the crimes of bribery of a person holding a public trust and commercial bribery. While it is true, as the Government states, Resp. Br. at 21-22, that bribery originally was confined to those in judicial office, the concept has evolved to include only those who hold a public trust, e.g., public officials, jurors, electors. It has not expanded

to include the corruption of private individuals. See Point A, *supra*.[9]

In the instant case, the Louisiana commercial bribery statute and bribery as used in the Travel Act are synonymous in label only; the rationale of *Nardello* thus requires that the distinction that has traditionally been made in the definition and usage of bribery and commercial bribery be respected in interpreting the Travel Act.[10] Petioner's view should prevail.

---

[9] Both the Second Circuit, in *United States* v. *Brecht*, *supra*, and Judge Rubin in dissent in the court below uphold Petitioner's position on the scope of bribery. Both the Second Circuit and Judge Rubin relied on the paucity of state prohibitions of commercial bribery in 1961. Judge Rubin also noted that, as recently as 1976, six states did not even mention the word "bribery" in defining the offense of "commercial bribery". For additional support of Petitioner's view, see point A above, the opinion in *Brecht*, and the dissent in the court below.

[10] It should be noted that the government's argument as to arson is equally invalid. The Government refers in its brief to the fact that if arson under the Travel Act were limited to its common law meaning, it would be restricted to cases in which a dwellinghouse was burned. Resp. Br. at p. 23. What the Government fails to reveal, however, is that the common law definition of arson had been transformed by 1961 in all the states. By the time the Travel Act was passed, the statutes of all the states defined arson not only as the burning of a dwellinghouse, but also as the burning of all other buildings and movable property. In Arthur F. Curtis, *The Law of Arson* (1936), the author states:

> An avalanche of statutes has overwhelmed the common law crime of arson and obliterated its limits so that its former scope is interesting only in a historical sense. Where it was originally confined to dwellings and nearby buildings, it is now extended to all manner of structures including even bridges. Where it formerly protected only the habitation of man, it now covers personal property such as building material, household goods, and even crops.

Id. at 2. Later, the author states:

> The penal laws of the United States are now complete so that all offenses are statutory, leaving no common law crimes.

Id. at 15. In 43 *Journal of Criminal Law and Criminology* 54, under the legal aspects of arson, the author states:

> To remedy inadequacies of the common law, the legislatures of the various states gradually began to extend and broaden the definition of crime, until today it covers all kinds of buildings and structures even including the burning of one's own property, whereas at common law it was limited to the burning of a dwellinghouse occupied by another person.
>
> While the legislative enactments in some states were adequate, in other they fell short. The Model Arson Law was designed not only to bring about uniformity but to correct the deficiencies of the common law and the statutory law.

Thus in 1965 when arson was added as an unlawful activity, within the purview of the Travel Act, the common law definition of arson had been modified by all of the states. By 1961 arson had been transformed from its early common law limitation in the same manner that extortion had evolved as outlined above. This was not the case with respect to bribery.

C. The Legislative History of the Travel Act Demonstrates That Congress Intended to Define Bribery With Reference to Persons Charged With a Public Trust.

The Government has selectively quoted from the legislative history of the Travel Act in an attempt to suggest that Congress contemplated encompassing commercial bribery within the Act's strictures. Resp. Br. at pp. 28-32. In fact the legislative history supports equally well Petitioner's definition of bribery. In his statement before the House Judiciary Committee, the Attorney General stated that the bill was aimed at "the huge profits in liquor, narcotics, prostitution, as well as the use of these funds for corrupting *public officials. . . .*" *Hearings on S. 1653-1658, S. 1665 Before the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. at 2 (1961) (emphasis added). This limited aim of 18 U.S.C. § 1952 has been confirmed both by this Court in *Rewis* v. *United States*, 401 U.S. 808 (1971), and by the Fourth Circuit in *United States* v. *Hawthorne*, 356 F.2d 740 (4th Cir.), *cert. den.*, 384 U.S. 908 (1966).

Throughout the legislative process, the reference to "bribery" recurred in conjunction with "official corruption", particularly by organized crime figures. Attorney General Robert Kennedy described the Act as covering "the bribery and corruption of local officials". *Hearings on S. 1653-8 and S. 1665 Before the Senate Committee on the Judiciary*

("Hearings"), 87th Cong. 1st Sess. at 11 (1961). When the House of Representatives proposed an amendment to the Bill which would have limited the coverage of the bill to extortion and bribery related to the specified crimes of gambling, liquor, narcotics or prostitution, Deputy Attorney General Byron R. White wrote in protest to the House Judiciary Committee that the amendment "removes from the purview of the bill the bribery of state, local and federal officials by the organized criminals unless we can prove that the bribery is directly attributable to [the four specified crimes.]" See also *Hearings, supra*, at 11, 13, 17, 108, and *passim*.

Obviously, the Department of Justice understood bribery to refer to "state, local and federal officials", and not to private persons. Its position is precisely consistent with the position taken by this Court in footnote 11 in the *Nardello* case, quoted *supra*; and the position which Petitioner has consistently asserted in the court below and now in this Court.

The Government attempts to bridge the absence of any legislative history in the Travel Act with respect to commercial bribery by arguing that the legislative history of 18 U.S.C. § 224, involving sports bribery and passed one year after the Travel Act, demonstrated an understanding by Congress that the term "bribery" in the Travel Act applied to private as well as official corruption, Resp. Br. at pp. 26, 30.

"[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). Such *post hoc* legislative materials relied on by the Government have uniformly been accorded little if any interpretive weight.[11] See *United States* v. *Wise*, 370 U.S. 405, 414 (1962); *Rainwater* v.

[11] This *post hoc* reason is particularly hazardous in the instant case because Congress has clearly separated commercial bribery from sports bribery. See footnote 7, *supra*, pp. 8-9 and §§ 1751, 1753 of S. 1437.

United States, 356 U.S. 590, 593-94 (1958); *United States* v. *United Mine Workers*, 330 U.S. 258, 282 (1947).[12]

If there is any doubt as to the meaning of the word "bribery" as used in Section 1952 of Title 18, U.S.C. that doubt is clearly dispelled by a reference to the legislative history of that statute and this Court should not permit that legislative history to be disregarded or obfuscated by references to legislative acts of Congress one year, three years, or ten years after the passage of the Travel Act. Bribery as embodied in the Travel Act was the serious offense that Congress perceived to be the corruption of public officials by elements of organized crime. Its common law definition remained in full force and effect in 1961 as distinguished from that of extortion and arson. The ruling of the Second Circuit in *United States* v. *Brecht*, *supra*, and the dissenting opinion of Judge Rubin in the instant case, represent the correct construction of the Travel Act, consistent not only with the intent of Congress but the opinion of this Court in *United States* v. *Nardello*, *supra*.[12a]

D. The Inclusion of Commercial Bribery Within the Ambit of the Travel Act Would Be Inconsistent With the Purposes Sought to Be Achieved by Congress.

The Government acknowledges only one of at least two purposes that Congress sought to achieve through passage of the Travel Act: the elimination or curtailment of the activities of organized crime. Resp. Br. at pp. 36-41. Congress also sought to *aid* local law enforcement officials not to pre-empt them from the field and not to encroach upon

[12] Likewise, the Government at page 30 of its brief refers to the legislative history of 18 U.S.C. § 224, by referring to a comment of Senator Keating. A reading of that statement, however, indicates that it relates only indirectly to 18 U.S.C. § 1952, and reflects at best a tentative personal opinion of Senator Keating.

[12a] A forthcoming Note exhaustively analyzes Congressional intent in a discussion of this case. The analysis reinforces Petitioner's position. Note, *The Scope of Bribery Under the Travel Act*, Journal of Criminal Law & Criminology (forthcoming).

the power of the states to regulate economic and individual behavior. The Travel Act was enacted to give material assistance to the States in combatting pernicious undertakings which cross state lines." *Senate Report No. 644*, 87th Cong., 1st Sess. at 4 (1961) (quoted in *United States* v. *Nardello*, 393 U.S. 286, 292, n.10); *House Report No. 966*, 87th Cong., 1st Sess. at 4 (1961) (cited in *Nardello, supra*). Thus "Congress' intent was to aid local law enforcement officials." 393 U.S. at 293.

The Travel Act effected an unusual expansion of federal jurisdiction in criminal law enforcement, in reaction to a particular and compelling national concern: the influence and spread of organized crime. It was enacted in response to Attorney General Kennedy's request for a package of legislation to enable the Justice Department to act effectively in that area. *Hearings on S. 1653-1658, S. 1665, Before the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 1-7, 16-17 (1961). The primary target of the Act was gambling, and acts related to or arising from gambling. *Id.* at 2, 16-17.

By incorporating violations of specified state criminal laws as an element, the Travel Act inevitably affects the delicate and historical federal-state balance in law enforcement:

> Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out of state customers. . . . [A]n expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies.

Rewis v. *United States*, 401 U.S. 808, 812.

While Congress possesses broad but not unlimited power to effect such a result, the Court has made clear that a drastic restructuring of the federal and state roles should not be assumed lightly. See *United States* v. *Bass*, 404 U.S. 336, 349; *Rewis* v. *United States, supra*. The Act must be construed as narrowly as possible without undermining its fundamental purpose: to control the national problem of "organized crime" and organized criminals, whose *modus operandi* often is to "reside in one state while operating or managing illegal activities located in another." Thus, especially with respect to crimes not usually connected with typical "organized crime" activities, only where "Congress conveys its purpose clearly, [will it] be deemed to have significantly changed" the balance of federal-state criminal jurisdiction. *United States* v. *Bass*, 404 U.S. 336, 349. See also *Erlenbaugh* v. *United States*, 409 U.S. 239, 247, n.21.

This Court has recently reaffirmed its concern about federal-state relations. In *Rizzo* v. *Goode*, 423 U.S. 362 (1976), a federal injunction requiring significant alteration in police procedures for handling civilian complaints was held inappropriate, in part, because of the "delicacy of the adjustment to be preserved between the federal equitable power and State administration of its own law." 423 U.S. at 378 (quoting from *Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951) and citing *O'Shea* v. *Littleton*, 414 U.S. 488, 500 (1974)).

The Respondent's interpretation of bribery significantly interferes with state power to regulate daily conduct. As membership in organized crime is not an essential element to a prosecution under the Travel Act, (see *United States* v. *Culbert*, 435 U.S. 371 (1978)), an expansive reading of bribery under the Travel Act would convert a myriad of minor state and federal offenses into Travel Act prosecutions because the offense or offenses involved may be somehow argued to be generically a subspecies of bribery.

Not only would the federal statutes such as 18 U.S.C. § 215, and 29 U.S.C. § 186 be subsumed under the Travel Act, but literally hundreds of state misdemeanors could,

at the discretion of the United States Attorney's office, be utilized to bring a federal travel prosecution. Thus, for example, the giving of a bribe by a seller of lumber to one who measures lumber—a penalty of fifty ($50) to two hundred ($200) dollars under Massachusetts law (see Mass. Regulation of Trade Law, Chapter 96 § 10 (1924)) —would bring a five-year and/or ten thousand dollars ($10,000) fine under the Travel Act. Likewise, the giving of a bribe to a chauffeur—a twenty-five dollar ($25) penalty under Wisconsin Law, see Wis. Stat. Ann. Vol. 20 § 134.05—would be subject to the Travel Act.

Thus, lesser included and related offenses, which under the Government's argument would fall generically under the subject of bribery, could be utilized by the United States Attorney's office to trigger a Travel Act prosecution if any interstate commerce were involved. To rely, as the Government does, Resp. Br. at pp. 44-45, on prosecutorial discretion and in the sentencing power of judges to cabin the broad sweep of its interpretation of the Travel Act, misconceives the Congressional concern for federal-state relations.

The holding of the Court of Appeals in the present case tips the balance decidedly in favor of federal intervention in areas of traditional state concern. It creates a federal felony out of acts bearing no particular relevance to the compelling national law enforcement interest, embodied in the Travel Act, of protection against and control of organized crime.[13] It imposes a potential penalty of five years imprisonment and a $10,000 fine for an offense which at the time of the enactment of the Travel Act was not even

[13] While this national interest clearly would be furthered by inclusion within the scope of the statute of acts of traditional bribery—i.e. "corrupt activities by public officials," *United States* v. *Nardello, supra,* 393 U.S. at 293, n.11—it would not be served significantly by inclusion of commercial bribery. As the Second Circuit recognized, commercial "bribery," unlike bribery of public officials, "typically is not a feature of organized crime," but rather "is typically an establishment transgression." *United States* v. *Brecht, supra,* 540 F.2d at 50.

a crime in thirty-seven states or the District of Columbia, and which today remains a minor misdemeanor in most state jurisdictions. There is no indication in either the language or the legislative history of the Act that Congress intended such a sweeping result. For purposes of the Travel Act "bribery" should be defined as an offer of money or other benefits to corrupt a person holding public office or charged with a public trust.

II.

To Include Commercial Bribery Within the Ambit of the Travel Act Violates the Petitioner's Due Process Right to Fair Notice as That Right is Variously Recognized in the Judicial Doctrines of Lenity, Void-for-Vagueness as Applied and the Rule of *Bouie* v. *City of Columbia.*

The Government's argument that the rule of lenity does not apply in the instant case rests entirely on the contention that there is little or no ambiguity in the meaning of "bribery." Resp. Br. at pp. 47-48. We have shown above, however, that legal usage at both the state and federal level was consonant with the definition of bribery advocated here by Petitioner. See Point IA *supra.* The legislative history of the Travel Act either supports Petitioner's position or is ambiguous. See point IC *supra.* A thorough consideration of the criteria governing the application of the rule of lenity must therefore be undertaken.

In each of the five recent cases cited by Respondent as delineating the scope of the rule of lenity, no ambiguity existed. In *Scarborough* v. *United States,* 431 U.S. 563 (1977) this Court stated:

> We do not face the conflicting pull between the text and the history that confronted us in *Bass.* In this case, the history is unambiguous and the text consistent with it.

431 U.S. at 577. Accord *United States* v. *Culbert*, 435 U.S. 371, 379 (1978) ("But here Congress has conveyed its purpose clearly and we decline to manufacture ambiguity where none exists."); *United States* v. *Naftalin*, —— U.S. ——, 60 L.Ed. 2d 624, 633 (1979) (words "plainly impose meaning"); *United States* v. *Batchelder*, —— U.S. ——, 47 U.S.L.W. 4611 (June 4, 1979); *Barrett* v. *United States*, 423 U.S. 212, 217 (1976).

As ambiguity *does* exist in the instant case, the rule of lenity, *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *Bell* v. *United States*, 349 U.S. 81, 83 (1955) should be applied. In *Dunn* v. *United States*, —— U.S. ——, 99 S.Ct. 2190 (1979), this Court articulated a constitutional basis for the rule of lenity:

> [t]his practice reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.

Dunn thus suggests an examination of two bodies of law: the void-for-vagueness doctrine and the rule of *Bouie* v. *City of Columbia*, 378 U.S. 347, 353-354 (1964), to determine when the interpretation of a statute is sufficiently ambiguous to invoke the rule of lenity.

A. The void-for-vagueness doctrine

The void-for-vagueness doctrine rests on two elementary principles integral to the broader concept of due process: (i) that the law be plain and intelligible so that the citizenry, and particularly those who may stray from the law,[14] can be charged with knowledge of the criminal consequences

[14] Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459-61 (1897).

of certain specified acts, *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921), *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *McBoyle* v. *United States*, 283 U.S. 25, and *Lanzetta* v. *New Jersey*, 306 U.S. 451; and (ii) that the criminal justice system operate with the maximum degree of precision to achieve the even-handed application of sanctions for acts specified by the legislature to be crimes, rather than permitting judges or juries to punish behavior which they find personally offensive. *United States* v. *Reese*, 92 U.S. 214 (1876) and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

The Fifth Circuit's interpretation of "bribery" and its application of the Travel Act to Petitioner denied him fair notice in two ways. First, the interpretation at issue here is novel and contrary to the legally accepted use of the term; hence Petitioner was not given fair notice of the crime. Second, the conflict between the circuits as to the meaning of the Act demonstrates the uncertainty inherent in the particular application of the Travel Act to Petitioner. We address these points in turn.

This Court has previously acknowledged that in deciding the intent of Congress, the judiciary must consider past usage:

> The opinion in the Nash case [*Nash* v. *United States*, 229 U.S. 373 (1913)], also drew support from the suggestion that language in a criminal statute which might otherwise appear indefinite may derive definiteness from past usage.

Winters v. *New York*, 333 U.S. 507, 537-538 (1948) (Frankfurter dissenting).

Further, this Court in determining past usage, first looks to the common law usage of the terms. In *Weeds, Inc.* v. *United States*, 255 U.S. 109 (1921), Justice Pitney noted that "the natural standard, according to which this provision of the act ought to be interpreted, is that . . . adhered

to by the common law time out of mind." *Id.* at 112. Similarly, in *Lanzetta* v. *State of New Jersey,* 306 U.S. 451 (1939), the Court struck down a statute on vagueness grounds because the meaning of the term "gang" was not derivable from common law or from any other source of law. *Id.* at 454-5. Accord, *Connally* v. *General Construction Company,* 269 U.S. 385, 391 (1926) ("the decisions of the court upholding statutes as sufficiently certain rested upon a conclusion that they employed words . . . having . . . a well settled common law meaning"); *Champlin Refining Co.* v. *Corporation Comm. of Oklahoma,* 286 U.S. 210, 242-3 (1932) ("The general expressions employed here are not known to the common law."). While antiquity of common law usage may not save a statute from condemnation under the vagueness doctrine, *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972), interpreting a statute contrary to the accepted legal usage only introduces indefiniteness and uncertainty into its terms. Exactly this circumstance occurred in the instant case and 18 U.S.C. § 1952 should be ruled vague as applied or the rule of lenity should be invoked and the familiar interpretation of bribery should be accepted.

This Court has relied upon the existence of divergent judicial decisions of state courts to show the difficulty, if not the impossibility, of ascertaining the meaning of a statute. See, *e.g., United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 89-90 (1921) and *Lanzetta* v. *New Jersey,* 306 U.S. 444, 457 (1939). It has held that when two of this Court's own interpretations of the same statute differ, a conviction under one of those interpretations could not be upheld. See *James* v. *United States,* 366 U.S. 213 (1961). While conflicts among circuits are not in themselves proof of vagueness, the nature of the conflicts here among three circuits evidences so serious an ambiguity in the statute as to require invocation of the rule of lenity.

B. A Broad Interpretation of the Travel Act When Applied to the Defendant Amounts to an *Ex Post Facto* Law in Violation of the Due Proces Clause of the Fifth Amendment.

This Court has consistently found that judicial interpretations which amount to *ex post facto* legislation are a violation of the due process clause of the Fifth and Fourteenth Amendments. See *Marks* v. *United States,* 430 U.S. 188 (1977); *Douglas* v. *Buder,* 412 U.S. 430 (1973); *Bouie* v. *City of Columbia,* 378 U.S. 347 (1963); and *Pierce* v. *United States,* 314 U.S. 306 (1941).[15]

The due process violations in these cases arose not only from the vague language of the statute itself, as in the *Lanzetta* and *Connally* line of cases, but also from the unforeseen and retroactive expansion of a statute due to judicial construction. To a large degree, this aversion to judicial expansion of criminal statutes rests upon the idea that the specification of criminal offenses is the province of the legislature and not of the court, see, *e.g., United States* v. *Bass,* 404 U.S. 336, 348; *United States* v. *Boston and Maine Railroad,* 380 U.S. 157, 160 (1965), that penal statutes are to be interpreted with exactitude, *United States* v. *Campos-Serrano,* 404 U.S. 293 (1971); *Smith* v. *United States,* 360 U.S. 1 (1959); *F.C.C.* v. *American Broadcasting Co.,* 347 U.S. 284 (1954); and *Pierce* v. *United States,* 314 U.S. 306 (1941), and that penal statutes "will not be read to create crimes . . . unless the purpose so to do is plain." *United States* v. *Noveck,* 271 U.S. 201, 204 (1926).

In *Pierce,* for example, this Court reversed the Petitioner's conviction and stated:

> [J]udicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the

---

[15] See also *Splawn* v. *California,* 431 U.S. 595, 601 (1976) wherein this Court, citing *Bouie,* has stated: "the elements of a statutory offense may not be so changed by judicial interpretation as to deny to accused defendants fair warning of the crime prohibited."

> common law that crimes must be defined with appropriate definiteness.

Id. at 311.

In *Bouie* v. *City of Columbia, supra,* the Court reversed the conviction of civil rights demonstrators who were charged with violations of a South Carolina trespass law. Although this Court recognized that the South Carolina Supreme Court's judicial construction of the criminal trespass statute could be applied in all *future* cases, it was impermissible, the Court found, to apply that construction to the defendants in the very case establishing that construction. For, the Court stated:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids . . . If a state legislature is barred by the *Ex Post Facto Clause* from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. *Smith* v. *Cahoon,* 283 U.S. 553, 565. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, *General Principles of Criminal Law* (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue,' it must not be given retroactive effect.

378 U.S. at 353-54 (1974).

More recently, this Court in addressing an *ex post facto* challenge to the retroactive application of a judicial interpretation of a criminal statute found such application a violation of the Due Process Clause. *Marks* v. *United States,* 430 U.S. 188 (1977). Unlike *Bouie* where the due

process violation arose from an expansive construction of a previously narrowly defined statute, the due process violation in *Marks* arose because the statute "always used sweeping language to describe that which (was) forbidden," 430 U.S. at 195. Thus, a person is deprived of the notice guaranteed by the due process clause either when he is subject to an expansive interpretation of a previously narrowly drawn statute as in *Bouie* or when he is subject to a new construction given a statute whose language is "sweeping" as in *Marks.*

In the instant case, the Petitioner was denied fair notice consistent with due process in both senses. First, at common law, bribery pertained solely to bribery of public officials. See point IA above. Therefore, the expansive construction of the term "bribery" given by the Fifth Circuit in the instant case is impermissible under *Bouie* because it results in lack of notice to *this* Petitioner.

Second, to the degree that the term bribery is subject to a broad or "sweeping" definition as given to it by the lower court, that definition can *not* permissibly be applied to Petitioner under *Marks* because he could not have had fair notice from a statute, which has been subject to and given multiple interpretations, as to which interpretation would be relied upon. Compare *United States* v. *Brecht,* 540 F.2d 45 (2nd Cir. 1976) with *United States* v. *Pomponio,* 511 F.2d 953 (4th Cir. 1975), *cert. denied* 423 U.S. 874 (1975).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

IRA J. KURZBAN
KURZBAN & KURZBAN, P.A.
700 Brickell Avenue, Suite 901
Miami, Florida 33131

LEWIS A. KORNHAUSER
New York University School of Law
40 Washington Square South
New York, N.Y. 10012

ROBERT G. HAIK
4616 Jefferson Highway
Metairie, Louisiana

PERRIN C. BUTLER
144 Elk Place Plaza
New Orleans, Louisiana 70112

LEONARD B. BOUDIN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN
30 East 42nd Street
New York, N.Y. 10017

ALBERT J. AHERN, JR.
One Skyline Place
5205 Leesburg Pike
Bailey's Crossroad, Virginia 22041

Certificate of Service

I hereby certify that on September 27, 1979, I caused three copies of the foregoing Reply Brief in No. 78-959 to be served by first class mail, postage prepaid, upon Steven M. Shapiro, Esq., Office of The Solicitor General, U.S. Department of Justice, 10th and Constitution Avenue, Washington, D.C. 20530.

Dated: New York, N. Y.
September 27, 1979

LOUIS MARK

QUINTON C. VAN WYNEN
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
Commission Expires March 30, 1981

APPENDIX

This Appendix examines the treatment of bribery, commercial bribery, sports bribery, extortion, and blackmail in the fifty states, the District of Columbia, and under the Model Penal Code. In particular, we compare the treatment of bribery and commercial bribery as distinct crimes to the assimilation of blackmail and extortion. In each jurisdiction we list the statute and some indication of the severity with which the jurisdiction treats the crime. When possible we have indicated when the cited statute went into effect. The sports bribery statutes are included largely to facilitate comparison with Respondent's appendices.

The data presented may be briefly summarized. While under the Model Penal Code and 45 of the 51 jurisdictions, blackmail and extortion have been merged, 21 jurisdictions do not even have a criminal statute governing commercial bribery. Further, the Model Penal Code, and 24 of the 30 jurisdictions that have *any* commercial bribery statute, treat bribery separately and more harshly than commercial bribery. The rationale of *Nardello* therefore dictates that the Travel Act be construed so as not to encompass commercial bribery.

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Alabama	Ala. Code tit. 13, § 13-5-30, 31 Classification: offense against public administration. Penalty: 2 to 10 years	NONE	Ala. Code tit. 13 §13-4-9 Classification: Forgery and Fraudulent Practices Penalty: felony (1947)	Ala Code tit. 13 § 13-3-3 Classification: offenses involving theft Penalty: $1,000 fine; 1 year imprisonment	Ala. Code. tit. 13-3-2 Classification offenses involving theft. Penalty: $1,000 fine; 1 year imprisonment
Alaska	Alaska Stat. § 11-56 - 100 Classification: offense against public administration Penalty: class B felony (as of Jan. 1st, 1980)	Alaska Stat. § 11-46-660, 670. Classification: offense a-against property Penalty: class C felony as of (Jan. 1, 1980)	NONE	Alaska Stat. § 11-41-520 Classfication: offense against the person Penalty: class B felony (as of Jan. 1st, 1980)	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Arizona	Ariz. Rev. Stat. § 2602 Classification: bribery Penalty: class 4 felony	NONE	Ariz. Rev. Stat. § 2309 Classification: organized crime and fraud Penalty: class 4 felony	Ariz. Rev. Stat. §§ 1804, 2302 et seq. Classification: § 1804, theft; § 2302 organized crime and fraud Penalty: felony, with class varying with circumstances	No separate blackmail offense
Arkansas	Ark. Stat. Ann. § 41-2703 Classification: offense against Public Administration (corrupt influence) Penalty: class D felony	NONE	Ark. Stat. Ann. § 41-3288 Classification: offense against public order (gambling) Penalty: class D felony	Ark. Stat. Ann. § 41-2202, 2203 Classification: offense against public order (theft) Penalty: varies with amount	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
California	Cal. Penal Code §§ 67, 67.5 , 68, 85, 86, 92, 93 Classification: crime, by and against the executive power (67, 67.5 , 68); Crimes against the Legislative Power (85, 86); crimes against Public Justice (92, 93) Penalty: 2,3, or 4 disqualification from office (67,68); variable (67.5); 2, 3 or 4 years (85, 86, 92, 93)	NONE	Cal. Penal Code, § 337 b, c, d, and e Classification: crimes against the person (Gaming) Penalty: felony imprisonment or up to $5,000.00 fine, or both (1921)	Cal.Penal Code § 518 Classification: crimes against property (extortion) Penalty: 2, 3 or 4 years	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Colorado	Colo. Rev. Stat. § 18-8-302 Classification: offenses-Governmental Operation Penalty: Class 3 felony	Colo. Rev. Stat. § 18-5 401 Classification: offenses involving fraud Penalty: class 5 felony	Col. Rev. Stat. § 18-5-403 Classification: involving fraud Penalty: class 5 felony (Colo. has had a sports bribery law since 1947)	Colo. Rev. Stat. § 18-3-207;18-15-101, 102, 105, 107 Classification: offenses against the person (18-3-207); offenses-making, financing, or colection of loans (18,15-101, et seq.)	No separate blackmail offense
Connecticut	Conn. Gen. Stat. Ann. §§ 53a-147, 148 (West) Classification: bribery offenses against the Administration of Justice, and related offenses Penalty: class D felony	Conn. Gen. Stat. Ann. §§ 53a-160, 161 (West) Classification: (same as Public official bribery) Penalty: class A misdemeanor	Conn. Gen. Stat. Ann. §§53a-162, 163, 164 (West) Classification: same as public official bribery Penalty: Class D felony (162); class A mis. (163, 164)	Conn.Gen. Stat. Ann § 119 (5) (West) Classification: Larceny, Robbery & related offenses Penalty: class C felony	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Delaware	Del. Code. tit. 11 §§1201, 1203 Classification: offenses against Public Administration Penalty: class D felony	Del. Code. tit. 11 §§ 881, 882 Classification: offenses involving property Penalty: class A misdemeanor (recent) ?	same as commercial bribery; also Del. Code tit. 28 §§ 701, 702, 703, 704: Classification: sports & amusements: influencing results of sporting events by bribery and other unlawful means (28 § 701 et seq.) Penalty: not more then $3,000.00 or not more than 3 years or both (1947)	Del. Code. tit. 11, § 846 Classification: offenses involving property Penalty: class D felony	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
District of Columbia	D.C. Code §22-701 Penalty: Not more than $500 or 3 years or both (enacted 1901)	None	D.C. Code §22-1513 (enacted 1901)	D.C. Code §22-2306 (intent to commit extortion by communication of illegal threats or commands)	D.C. Code §22-2305 (includes extortion) Penalty: Not more than 5 years or $1000.00 or both

The District of Columbia does not distinguish between extortion and blackmail by the position of the actor

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Florida	Fla. Stat. Ann. § 838-015 (west) Classification: bribery, misuse of public office Penalty: 3rd degree felony	NONE	Fla. Stat. Ann. § 838.12(West) Classification: bribery; misuse of public office Penalty: 3rd degree felony	Fla. Stat. Ann. § 812 Classification: larceny, robbery, & related crimes Penalty: variable	No separate blackmail offense
Georgia	Ga. Code Ann. § 26-2301 Classification: abuse of Governmental Office Penalty: up to $5,000 fine or 1-20 years or both	NONE	Ga. Code Ann. § 26-2711 Classification: gambling related offenses Penalty: $1,000 to $5,000 fine or 1 to 5 years or both	Ga. Code Ann. § 26-1804 Classification: Theft Penalty: 1-10 years (See also §§ 89-9909 and 40-9901 for extortion by a public official)	No separate blackmail offense

(1968)

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Hawaii	Haw. Rev. Stat. § 710-1040 Classification: offense against public administration Penalty: class C felony	Haw. Rev. Stat. § 708-880 Classification: offense against propert rights Penalty: misdemeanor (post-1961)	Haw. Rev. Stat. § 708-881 Classification: against property rights Penalty: misdemeanor (1947)	Haw. Rev. 708-800, 830(3)(5) Classification: offense against proerty rights Penalty: variable	No separate blackmail statute
Idaho	Idaho Code §§ 18-1352 Classification: bribery and corruption Penalty: felony	NONE	NONE	Idaho Code § 18-2801 to 2808 Classification: extortion Penalty: $5,000 or 5 years or both	No separate blackmail statute

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Illinois	Ill. Ann. Stat. ch-38 § 33-1 (Smith-Hurd) Classification: offense affecting governmental functions Penalty: Class 4 felony	Ill. Ann. Stat. ch 38 § 29A-1,2,3 (Smith-Hurd) Classification: offense affecting public health, safety, and decency Penalty: $500 fine (business offense) [became law 1969]	Ill. Ann. Stat. § 29-1, 2 (Smith-Hurd) Classification: same as commercial bribery Penalty: class 4 felony [became law in 1921]	Ill. Ann. Stat. ch 38 § 16-1 (c) Classification: Theft and related offenses	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Indiana	Ann. Inc. Code § 35-44-1-1(1)(2) (West) Classification: offense against public administration Penalty: class C felony ($10,000 or 5 years)	NONE	Ann. Ind. Code § 35-44-1-1 (5) Classification: same as public official bribery Penalty: same as public official bribery (orginally passed in 1947 amended 1976)	Ann. Ind. Code § 35-45 2-1 Classification: offenses against Public Health, Order, & Decency Penalty: variable	No separate blackmail offense
Iowa	Iowa Code Ann. § 722.1 (West) Classification: bribery & corruption Penalty: class D felony	Iowa Code Ann. § 722.10 (West) Classification: bribery & corruption Penalty: class D felony [added by acts 1978, effecttive Jan. 1st, 1979]	Iowa Code Ann. § 722.3 Classification: bribery & corruption Penalty: aggravated misdemeanor [1953 Iowa Acts]	Iowa Code Ann. § 711.4 Classification: robbery & extortion Penalty: class D felony	No separate blackmail statute

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Kansas	Kan. Stat. Ann §§ 21-3901 Classification: affecting public trusts Penalty: class D felony and for feiture of office and disqualification	Kan. Stat. Ann. § 21-4405 Classification: crimes affecting business Penalty: class E felony [became law in 1969]	Kan. Stat. Ann. § 21-4406 Classification: affecting business Penalty: class E felony [became law in 1969]	Kan. Stat. Ann. § 21-3701 (1)(c); 21-3902 (b) Classification: crime against property(3701) crime affecting public trust (3902) Penalty: variable (3701); class a misdemeanor plus forfeit of office (3902)	Kan. Stat. Ann. § 21-3428 Classification: crimes against persons Penalty: class E felony

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Kentucky	Ky. Rev. Stat. § 521.020 (Bobbs-merrill) Classification: bribery and corrupt influences Penalty: class D felony	Ky. Rev. Stat. § 518.020 (Bobbs-Merrill) Classification: Miscellaneous crimes business Penalty: class A misdemeanor Ky law (1974(?))	Ky. Re. Stat. § 518.030 Classification: same as the commercial bribery Penalty: class A misdemeanor (Ky law 1952)	Ky. Rev. Stat. § 514,080 Classification: theft and related offenses Penalty: variable	No separate blackmail offense
Louisiana	La. Rev. Stat. Ann. § 14:118 (West) Classification: offense against organized overn-ment Penalty: $1,000 fine; 4 years in prison or both	La. Rev. Stat. Ann. 14:73 (West) Classification: offense against property Penalty: $500.00 fine 1 year in prison or both (passed, 1920)	La. Rev. Stat. Ann. 14:118.1 (West) Classification: offense affecting organized govern-ment Penalty: $10,00 fine; 10 years in prison (passed, 1932)	La. Rev, Stat. Ann. 14-66 Classification: offense against property Penalty: variable	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Maine	17-A Me. Rev. State. Ann. § 602 (West) Classification: bribery & corrupt practices Penalty: class C crime	17-A Me. Rev. Stat. Ann. § 904 (West) Classification: fraud Penalty: class D crime (passed 1976)	17-A Me. Rev. Stat. Ann. § 904 (West) Classification: theft Penalty: class D crime (passed 1976)	17-A Me. Rev, Stat. Ann. §§ 351, 355, (West) Classification: Theft Penalty: variable	No separate blackmail offense
Maryland	MD. Crimes & Punishments Code Ann. art. 27, § 23 Classification: bribery Penalty: $100.00 to $5,000.00 fine; 2 to 12 years in prison; or both; disenfranchisement; disqualification from office-holding	NONE	MD. Crimes and punishments Code Ann. art. 27, § 24, 25 Classification: bribery Penalty: $100.00 to $5,00.00 fine; 6 months to 3 years in prison, or both (1947)	MD. Crimes and punishments code Ann. art. 27, §§ 561 562, 562 A Classification: Threats and threatening letters	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Massachusetts	Mass. Gen. Laws Ann. ch 268A § 2 (West) Classification: Conduct of Public officials and employees Penalty: maximum $5,000 fine; 3 or 4 years in prison; disqualification from office	Mass. Gen. Laws Ann.ch. 271 § 39 (West) Classification: crime against public policy Penalty:maximum $500.00 fine; 1 year in prison or both (except for hiring agents)	Mass. Gen. Laws Ann. ch. 271, § 39A (West) Classification: crime against Public Policy Maximum Penalty: 1,000 fine; 2 years in prison or both	Mass. Gen. Laws Ann. ch. 265 § 25 Classification: crimes against the person Maximum Penalty: $5,000 fine; 15 years in prison	No separate blackmail offense
Michigan	Mich. Comp. Laws Ann. §§750 117 -118 Classification: bribery and corruption Maximum Penalty: $5,000 fine; 10 years in prison (felony) (paassed, 1905)	Mich. Comp. Laws Ann. § 750 125 Classification: bribery & corruption Maximum Penalty: $500 fine; 1 year in jail (misdemeanor) (passed, 1921)	Mich. Comp. Laws Ann. § 750.124 Classification: bribery and corruption Penalty: felony (passed, 1931)	Mich. Comp. Laws Ann. § 750-213, 214 Classification: extortion Maximum Penalty: $10,000 fine: 20 years in prison (felony)	No separate blackmail statute, but §750. 214 applies to a public official only (passed 1931)

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Minnesota	Minn. Stat. Ann. 609.42 (West) Classification: crime affecting public officer or employee Penalty: $10,000 fine; 10 years, or both; forfeiture of office, disqualification from office	NONE	Minn. Stat. Ann. 609.825 (West) Classification: miscellaneous crimes Penalty: $5,000 fine; 5 years in prison, or both (passed 1947)	Minn. Stat. Ann, 609.27 (West) Classification: crimes of compulsion Penalty: variable	No separate blackmail offense
Mississipi	Miss. Code. Ann. § 97-11-11, Classification: offenses by public official Maximum Penalty: $1,000 fine; 10 years in prison (11); $5,000 fine; 10 years in prison; forfeit; disqualification (13) (passed 1857)	NONE, except §97-11-11 reaches private trustees.	Miss. Code Ann. § 97-29-18 Classifications: crimes against public morals Penalty: 6 months to 5 years in pri. $100 to $1,000 fine; or both (1954)	Miss. Code Ann, § 97-11-33 Classification: offenses by Public officials Penalty: $300 fine; 3 months in jail; removal from office (see also § 97-19-13)	Miss, Code Ann. § 97-3-81 Class: against the person Penalty: 5 years in prison

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Missouri	Mo. Ann. State § 576. 010, 020 (Vernon) Classification: offense affecting government Penalty: D felony	Mo. Ann Stat. § 570. 150 (Vernon) Classification: stealing and related offenses Penalty: class A misdemeanor (new)	Mo. Ann. Stat. § 570 155 (Vernon) Classification: stealing and related offenses Penalty: felony; 10 years; $10,000 (1921)	Mo. Ann. Stat. § 570.010 (4) 030 (Vernon) Classification: stealing etc. Penalty: variable	No separate blackmail offense
Montana	Mont. Rev. Codes Ann. §45-7-101 Classification: offense against public administration Penalty: 10 years; disqualification from office	NONE	Mont. Rev. Codes Ann. § 45-8-24 Classification: offense against public order Penalty: max. $5,00 fine; 10 years in prison, or both (post - 1961)	Mont. Rev. Codes Ann. § 45-5-203 Classification: offense against the person Max. Penalty: 10 years (see also § 45-8-213)	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORT BRIBERY	EXTORTION	BLACKMAIL
Nebraska	Neb. Rev. Stat. §28-917 (supp. 1978) Classification: offense involving integrity of government Penalty: class IV felony	Neb. Rev. Stat. § 28-613 (Supp. 1978) Classification: offenses involing fraud Penalty: class I misdemeanor (Neb. had a Comm. bribery law in 1907)	Neb. Rev. Stat. §28-614 (Supp. 1978) Classification: offenses involving fraud Penalty: class II misdemeanor (Neb. passed a sp. bribery law in 1947)	Neb. Rev. Stat. § 28-513 (Supp. 1978) Classification: offenses gainst properly Penalty: variable	No separate blackmail offense
Nevada	Nev. Rev. Stat. §§ 197.010, 020, 030 199.010, 020, 030 Classification: crimes by and against the executive Power (197); crimes against public justice Penalty: $5,000 fine; 10 years in prison	NONE	Nev. Rev. Stat.§§ 207.290 Classification: miscellaneous crimes Penalty: felony; 1 to 6 years $5,000 fine; or both (passed, 1965)	Nev. Rev. Stat.§§ 205.320 Classification:crime against property Penalty: 1 to 10 years; $5,000 fine, or both	Note that Nev. has a statute on extortion by a public officer (§197.170) and on extortion via letters (§ 207.180)

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
New Hamphire	N.H. Rev. Stat. Ann § 640:2 Classification: corrupt practices Penalty: class B felony	N.H. Rev. Stat. Ann. §638:7 Classification: fraud Penalty: misdemeanor (1971)	N.H. Rev. Stat. Ann § 638:8 Classification: fraud Penalty: class B felony (1971)	N.H. Rev. Stat. Ann § 637:1,5 Classification: theft Penalty: variable	No separate blackmail statute
New Jersey	N.J. Stat. Ann. §2C:27-2 (West) Classification: offense against public administration Penalty: variable	N.J. Stat. Ann. §2C:21-10 (West) Classification: forgery and fraudulent practices Penalty: variable (NEW)	N.J. Stat. Ann §2C:21-11(West) Classification: forgery and fraudulent practices Penalty: variable (N.J. had a sports bribery law 1945)	N.J. Stat. Ann. §2C:202 ,5 Classification: theft and related offenses Penalty: variable	No separate blackmail offense'

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
New Mexico	N.M. Stat. Ann. §40A-24-1,2 Classification: bribery Penalty: 3rd degree felony plus forfeit of office	NONE	N.M. Stat. Ann §40A-19-13 Classification: gambling Penalty: 4th degree felony (1963)	N.M. Stat. Ann. §40A-16-8 Classification: larceny Penalty: 3rd degree felony	No separate blackmail offense
New York	N.Y. Penal. Law § 200.00, .04, .10, (McKinney) Classification: offenses against public administration Penalty: class D felony (in most cases)	N.Y. Penal. Law §180.00, .03, 05, 08, (McKinney) Classification: offenses involving fraud Penalty: misdemeanor (1905)	N.Y. Penal Law §180.35, .40 (McKinney) Classification: offenses involving fraud Penalty: class D felony (1921)	N,Y. Penal Law §155.05 (e) Classification: offenses involving theft Penalty: variable	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
North Carolina	N.C. Gen. Stat. §14-217, 218, 219 Classification: offenses against public justice Penalty: felony, variable punishment depending on status of felony	N.C. Gen. Stat. §14-353 Classification: general police regulations Penalty: misdemeanor, $500 fine; 6 months in jail, or both (1913)	N.C. Gen. Stat. §14-373, 374, 376, 377 Classification: general police regulations Penalty: felony; 1 to 10 years variable fine; (See also § 14-380.1) (1921)	N.C. Gen. Stat. §14-118.4 Classification: frauds Penalty: felony NOTE: North Carolina does Not distinguish between extortion and blackmail on the basis of the perpetrator	N.C. Gen. Stat. §14-118 Classification: frauds Penalty: misdemeanor
North Dakota	N.D. Cent. Code §12.1-12-01 Classification: bribery, unlawful influence of public servants Penalty: class C felony	N.D. Cent. Code §12.1-12-08 Classification: bribery unlawful influence of public bribery Penalty: Class C felony (1973)	N.D. Cent. Code §12.1-12-07 Classification: bribery unlawful influence of public bribery Penalty: Class C felony (1973)	N,D. Cent. Code §12.1-23-01, 902 (2) Classification: theft Penalty: variable	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
OHIO	Ohio Rev. Code Ann. §2921.02 (page) Classification: offenses against justice and public administration Penalty: 3rd degree felony and disqualification from office	NONE	Ohio Rev. Code Ann. §2915. 06 (Page) Classification: gambling Penalty: 4th degree felony	Ohio Rev. Code Ann. §2905.11 Classification: Kidnapping and Extortion Penalty: 3rd degree felony	No separate blackmail offense
Oklahoma	Okla. Stat. Ann. tit. 21 §381, 382 (West) Classification: crime against public justice Penalty: Bribery-5 years or $3,000 fine and 2 years, Bribed official 10 years or $5,000 fine and 1 year plus forfeit and disqualification	NONE	Okla Stat. Ann. tit. 21, § 399, 400 Classification: crimes against public justice Penalty: 5 years or $3,000 and 1 year in prison or $3,000 and 1 year in jail for bribed person (1947)	Okla Stat. Ann tit. 21 §§1481-4 Classification: crime against property Penalty; up to 5 years NOTE: § 1484, refers to extortion by a public official	Okla Stat, Ann. tit. 21 § 1488 Classificatio crime against property Penalty: 5 years $10,000 or both

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Oregon	Or. Rev. Stat. § 162.015, .025 Classification: offense against state and public justice Penalty: Class B felony	NONE	Or. Rev. Stat. §165.085, 090 Classification: fraud and deception Penalty: class C felony (1971)	Or. Rev. Stat. §164.075 Classification: offense against property Penalty: class B felony	No separate blackmail offense
Penn-sylvania	18 Pa. Cons. Stat. Ann. §4701 (Purdon) Classification: Public Administration crime Penalty: 3rd degree felony	18 Pa. Const Stat. Ann. §4108 (Purdon) Classification: forgery and fraud Penalty: 2nd degree misde-meanor (Pa. has had a comm. bribery state since 1969)	18 Pa. Cons. Stat. Ann. §4109 (Purdon) Classification: forgery and fraud Penalty; 1st degree misdemeanot (Pa. has had a sports bribery state since 1939)	18 Pa. Cons. Stat. Ann. §3923 (Purdon) Classification: theft and related offenses Penalty: variable	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Rhode Island	RI. Gen. Laws §11-7-3,4 Classification: bribery Penalty: misdemeanor 1 year or $1,000 fine; (Note that bribery of a juror is punishable by a 7 year term)	RI. Gen. Laws §11-7-3, 4 Classification: bribery Penalty: misdemeanor-1 year or $1,000 (1881)	RI. Gen. Laws §11-7-9 Classification: bribery Penalty: $1,000 fine; or 2 years or both (1950)	RI. Gen. Laws §11-42-1 Classification: threats and extortion Penalty: 1 year or $1,000.00	RI. Gen. Laws §11-42-2 Classification: threats and extortion Penalty: 15 years or $5,000 or both
South Carolina	S.C. Code §16-9-210, 220 Classification: offenses against public justice Penalty: 5 years at hard labor or $3,000 fine and 1 year in jail (briber); 10 years hard labor or $5,000 fine and 2 years in jail (bribed)	S.C. Code §16-17-540 Classification: offense against public policy Penalty: $500 fine or 1 year or both (1905)	S.C. Code §16-17-550 Classification; offense against public policy Penalty: $10,000 or 10 years or both (1962)	S.C. Code §16-17-640 Classification: offenses against public policy Penalty; 10 years $5,000 or both	No separate offense

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
South Dakota	S.D. Complied Laws Ann. §§ 22-12A-4,5,6,7 Classification: Improperities and bribery in public office Penalty: class 4 felony- plus disqualification in some circumstances	NONE	NONE	S.D. Complied Laws Ann. §§22-30A-4 Classification: theft Penalty: variable. (See also §§22-12A 8,9	No separate blackmail offense
Tennessee	Tenn. Code Ann §§ 39-801-802 Classification: bribery, embracery, etc. Penalty: bribery--2 to 20 years; bribed --3 to 21 years plus disqualification	NONE (But see §§39-821, 822 the bribery of the agent of of common carrier) misdemeanor (1909)	Tenn. Code Ann. §§ 39-824 Classification: bribery, embracery, etc. Penalty: 1 to 5 years, $10,000 fine (1921)	Tenn. Code Ann §§ 4301 Classification: threats and extortion Penalty: 2-5 years	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Texas	Tx. Penal. Code tit. 8, §36.02 (Vernon) Classification: offense against public administration Penalty: 3rd degree felony (briber); 2nd degree felony plus forfeit or office (bribed)	Tex. Penal Code. tit. 7, § 32.43 (Vernon) Classification: fraud Penalty: 3rd degree felony (NEW)	Tex. Penal Code tit. 7, § 32.44, . (Vernon) Classification: theft Penalty: 3rd dgree felony (Texas has had a sports bribery law since 1947)	Tex, Penal Code. tit.,7 § 31.01, .02, 03. (Vernon) Classification: theft Penalty: variable	No separate blackmail offense
Utah	Utah Code Ann. § 76-8-103,105 Classification: offense against government Penalty: 3rd degree felony (briber) class B misdemeanor (bribal)	Utah Code Ann. § 76-6-508 Classification; offense against property Penalty: class B misdemeanor (1973)	Utah Code Ann. §76-6-514 Classification: offense against property Penalty: 3rd degree felony (1973)	Utah Code Ann. § 76-6-406 Classification: offense against property Penalty: variable	No separate blackmail offense

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Vermont	Vt. Stat. Ann. tit. 13, §§ 1101, 1102, Classification: bribery Penalty: 5 years or $300.00 (briber) 10 years or $1,000 plus forfeit and disqualification (bribal)	Vt. Stat. Ann. tit. 13 § 1106 Classification: bribery Penalty: 1 year or $100 to $1,000 fine or both (1904)	NONE	VT. Stat. Ann. tit. 13 § 1701 Classification: extortion and threats Penalty: three years or $500	No separate blackmail statute
Virginia	Va. Code § 18.2-438, 439 Classification: crimes against the administration of justice Penalty: class 4 felony (plus forfeit and disqualification bribed official)	Va. Code § 18.2-444 Classification: crimes against the administration of justice Penalty: class 3 misdemeanor (NEW) ?	Va. Code § 18.2-442, 443 Classification: crimes against the administration of justice Penalty: class 5 felony (1960)	Va. Code § 18.2-470, § 18.2-59 Classification: 470 -- crimes against the adminstration of justice 59--crimes against the person Penalty: 470-- class 4 misdemeanor 59- class 5 felony	No separate offense

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Washington	Wash. Rev. Code. Ann. § 9A.68 Classification: Bribery and corrupt influence Penalty: class B felony	Wash. Rev. Code Ann. §49.44.060 Classification: Labor regulation Penalty: Gross misdemeanor	Wash. Rev. Code Ann. § 67.04 010, .020 Classification: athletics, sports and entertainment Penalty: gross misdemeanor (1921)	Wash. Rev. Code Ann. §9A.56.110, .120,.130 Classification: theft and robbery Penalty: variable	No separate blackmail offense
West Virginia	W.Va. Code § 61-5A-3 Classification: bribery and corrupt practices Penalty: 1-10 years for an individual; $50,000 fine for a corporation; individuals are also disqualified from office	NONE	W.Va. Code § 61-10-22 Classification: crimes against public policy Penalty; felony--1 to 3 years or $1,000 or both (1945)	W.Va. Code § 61-2-13 Classification: crimes against the person Penalty; misdemeanor --2 to 12 months and $50 to $500 fine	No separate blackmail statute

STATE	BRIBERY OF PUBLIC OFFICIAL	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Wisconsin	Wis. Stat. Ann. § 946.10 Classification: crimes against government and its administration Penalty: class D felony	Wis. Stat. Ann. § 134.05 Classification: miscellaneous trade regulations Penalty: $10.00 to $500 fine or fine and imprisonment for up to 1 year (1905)	Wis. Stat. Ann. § 945.08 Classification: gambling Penalty: class D felony for bribery; class A misdemeanor for bribed	Wis. Stat. Ann. § 943.30., .31 Classification: crimes against properly Penalty: $2,000 fine or 5years or both (.30) $1,000 fine or 1 year or both (.31)	No separate blackmail statute
Wyoming	Wyo. Stat. § 6-8-201 Classification: offense against public justice Penalty: up to 14 years in penitentiary	NONE	Wyo. Stat. § 6-9-302 Classification: offenses against public policy Penalty: 1 to 5 years or $5,000 fine or both (1963)	Wyo. Stat. 6-8-510 Classification: offenses against public justice Penalty: $10.00 to $500.00 fine and up to 6 months in jail and removal from office	Wyo. Stat. 6-7-601 Classification offenses against public peace Penalty: up to 5 years

STATE	BRIBERY OF PUBLIC OFFICIALS	COMMERCIAL BRIBERY	SPORTS BRIBERY	EXTORTION	BLACKMAIL
Model Penal Code	§ 240.1 Classification: offenses against public administration Penalty: 3rd degree felony	§ 224-8 Classification: forgery and fraudulent practices Penalty: misdemeanor	§ 223.9 Classification: forgery and fraudulent practices Penalty: variable	§ 223.4 Classification: theft and related offenses Penalty: variable	No separate blackmail offense

No. 78-959

In the Supreme Court of the United States

OCTOBER TERM, 1978

VINCENT R. PERRIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-959

VINCENT R. PERRIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Petitioner's opening brief in this case was 15 pages in length and cited only nine authorities. Petitioner's reply brief is an extensive document citing a substantial number of new authorities and raising contentions that the government has not had an opportunity to address. The government submits this reply brief to respond to these new and belated assertions.

1. Petitioner argues (Reply Br. 4-10) that in 1961 the word "bribery" extended no further than

its common law definition and that, while the other terms appearing in 18 U.S.C. 1952(b)(2) should be given a generic interpretation to reflect contemporary meanings, the term "bribery" must be given a restrictive construction. In support of that argument, petitioner asserts that only 13 states had general commercial bribery laws in 1961. However, an additional 12 states had criminal commercial bribery statutes focused on employees in particular lines of business. See Note, *Control of Nongovernment Corruption By Criminal Legislation*, 108 U. Pa. L. Rev. 848, 849, 864, 866 (1960). Thus, one half of the states in the nation had enacted criminal commercial bribery laws prior to 1961. See *United States* v. *Niedelman*, 356 F. Supp. 979, 982 (S.D.N.Y. 1973). In addition, 32 states had criminal statutes prohibiting bribery in sporting events. See Note, *supra*, 108 U. Pa. L. Rev. at 865, 867. In all, 43 states had criminal laws forbidding different kinds of non-official bribery. See the appendix to our initial brief. Nor has petitioner denied that, prior to 1961, Congress had enacted a substantial number of criminal laws prohibiting non-official bribery. See our initial brief at 24-26.[1]

Because Congress drafted the Travel Act in such a way that it applies to interstate schemes violating

[1] Although petitioner argues that these commercial bribery laws are different from official bribery laws because they have greater specificity (Reply Br. 5-6), official bribery laws also define with particularity the class of regulated persons and the kinds of activities that are forbidden. See 18 U.S.C. 201.

state or federal bribery laws, without limitation on the type of bribery, the widespread existence of state and federal laws designating private corruption as a form of criminal bribery is a strong indication that the Travel Act should have a comparable reach. It should not be assumed that Congress was ignorant of its own non-official bribery laws or those of the 43 states that had enacted such legislation.[2] Nor should it be assumed that Congress harbored an unexpressed intention to limit the Act to a particular sub-category of bribery when the literal meaning of the word that it selected is generic. See *Webster's Third New International Dictionary* 275 (1961).[3]

[2] See *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979), slip op. 17-18: "It is always appropriate to assume that our elected representatives, like other citizens, know the law."

[3] The authorities cited by petitioner do not lend support to the contention that "bribery" is limited to "official corruption." The court of appeals in *United States* v. *Dansker*, 537 F.2d 40, 47 (3d Cir. 1976), expressly rejected the argument that the Travel Act should be so limited, noting that a generic interpretation of the Act "has enabled it to encompass state statutory expansions of the crimes of extortion, bribery and arson over the years, and thus more effectively carry out its purpose of aiding local law enforcement efforts to combat 'pernicious undertakings which cross state lines.'" S. Rep. No. 96-605 (Pt. 1), 95th Cong., 1st Sess. (1977), also relied on by petitioner (Reply Br. 8), shows clearly that Congress views commercial corruption as a form of "bribery." The Senate Report calls for enhanced federal penalties in light of the seriousness of commercial bribery, and refers to *United States* v. *Pomponio*, 511 F.2d 953 (4th Cir.), cert. denied, 423 U.S. 874 (1975), with approval. See *id.* at 738. Petitioner also cites 18 U.S.C. 1961, which defines the expression "racketeering acivity" to include various state law offenses (includ-

Petitioner also argues that commercial bribery is a less serious offense than official bribery under many state laws and should not be treated with comparable severity under the Travel Act (Reply Br. 17-18). That contention, however, ignores the nature of the offense prohibited by the Travel Act. The Act is concerned with the use of interstate facilities to carry on bribery, arson, or extortion in violation of federal laws or the laws of 50 different states. Those laws frequently provide differing penalties. But Congress prescribed a uniform federal sanction for persons who use the facilities of interstate commerce to violate such laws.[4]

---

ing bribery). It also extends to a number of federal statutory offenses (including those proscribed in 18 U.S.C. 201 and 224 and 29 U.S.C. 186). This statute, enacted in 1970, sheds no light on the congressional purpose underlying the Travel Act, which is drafted in different terms and prohibits different activities. Unlike 18 U.S.C. 1961, the Travel Act contains a single generic reference to "bribery" in violation of state or federal laws and does not list particular statutes. To the extent that it has any relevance here, 18 U.S.C. 1961 is supportive of the government's position because it demonstrates Congress' understanding that racketeers frequently make use of forms of bribery other than official bribery in carrying on their illegal activities.

[4] It is, of course, not unusual for Congress to prescribe substantial penalties for conduct that may be treated with greater lenience under state law, where the conduct involves the use of interstate facilities. See, *e.g.*, 18 U.S.C. 2421 (transportation of women for immoral purposes); 18 U.S.C. 1341 (practicing deceptive schemes through the mails). See also *United States* v. *Pomponio*, 511 F.2d 953, 957 (4th Cir.), cert. denied, 423 U.S. 874 (1975).

Nor is there merit to the argument that commercial bribery is inherently less serious than official bribery. Official bribery can involve small pay-offs to building inspectors or procurement personnel just as commercial bribery can involve small payments to private employees. As the facts in this case demonstrate, however, commercial bribery can also involve well-organized criminal ventures with sophisticated participants playing for large stakes. Commercial bribery—rendered more dangerous through the use of interstate commerce—has the demonstrated potential to cause serious injury to honest business firms as well as as to enrich the syndicate. See our initial brief at 38-41. See also J. Kwitny, *Vicious Circles: The Mafia In The Marketplace* 5-46, 94-99, 202-210, 241-246 (1979).

Although petitioner makes the bare assertion that commercial bribery is not a "feature of organized crime" (Reply Br. 18 n.13), he fails to come to grips with the clear evidence to the contrary that is cited in our initial brief at 38-41. If organized crime is free to use the facilities of interstate commerce to carry on commercial bribery schemes of the kind disclosed by this record, the congressional purpose to cut off the flow of illegal revenues to organized crime would be seriously undermined. As this Court observed in *Kordel* v. *United States*, 335 U.S. 345, 349 (1948), "there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it."

While it is true that one can envision relatively insignificant bribery offenses—involving both official and non-official bribery—Congress has made the judgment that use of interstate facilities to promote bribery is a serious threat to the national welfare. It is not appropriate to create exceptions from or loopholes in the statute simply because de minimis violations can be visualized, particularly in a case such as this involving an extensive criminal enterprise.

2. Petitioner also argues (Reply Br. 13-15) that the legislative history is equally supportive of the common law and generic definitions of the term "bribery." He notes that the congressional hearings contain references to both official and non-official corruption. In fact, however, all of the legislative history supports the generic view; none of it supports a restrictive common law interpretation. As we have noted in our initial brief (pages 28-32), the legislative history contains repeated references to non-official bribery, such as bribery of labor union officials and athletes. The existence of other references to official bribery suggests only that Congress recognized that the term bribery properly applies to *both* official and non-official corruption—that is, that Congress understood the contemporary generic meaning of the word bribery. There is not a hint in the legislative history that any Congressman or representative from the Department of Justice believed that the Act should apply only to official bribery. See *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 6-7.[6]

3. Petitioner further contends (Reply Br. 10-12) that this Court's decision in *United States* v. *Nardello*, 393 U.S. 286 (1969), provides no support for a generic interpretation of the word bribery. He argues that the Court embraced "blackmail" within the statutory term "extortion" because blackmail had been treated as a kind of extortion under various state statutes. But the same is true of bribery. Numerous federal and state statutes treat commercial corruption as a kind of criminal bribery. Nor is it relevant

---

[6] The letter from Deputy Attorney General White, referred to by petitioner (Reply Br. 14), shows that the Department of Justice believed that the Act should apply to official bribery. It does not suggest that anyone believed that private bribery should not also be encompassed. It is clear that Deputy Attorney General White did not entertain any such view, as shown by his subsequent report to Congress on behalf of the Department of Justice stating that the Travel Act applies, in appropriate circumstances, to bribery in sporting events. See our initial brief at 30-31. Although these views were expressed shortly after enactment of the Travel Act, they are identical with those of Senator Keating, who stated during hearings on the bill that became the Travel Act that it would apply to bribery of athletes "if you could prove item of travel with intent." Id. at 30. The interpretation of the Deputy Attorney General, who participated in the process of drafting the Travel Act, is entitled to substantial deference. See, *e.g.*, *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8. The views of the Deputy Attorney General, the Assistant Attorney General (see our initial brief at 32 n.27), and Senator Keating militate strongly against the argument that the Travel Act applies only to "official" bribery.

that commercial and official bribery are often prohibited in different statutes.[7] That was the situation in *Nardello* (393 U.S. at 288-289), but the Court nonetheless adopted a generic interpretation under the Travel Act. See *id.* at 293-296.

The direct relevance of *Nardello* in the present case lies in its conclusion that the word extortion should not be restricted, as it was at common law, to misconduct involving public officials (393 U.S. at 290, 292-293), but rather should extend to those actions "generally known" as extortion. Instead of giving the term extortion "an unnaturally narrow reading," the Court decided that a "generic" definition was most consistent with the purposes of the Act. See *id.* at 295-296. These considerations are directly relevant here: in both popular and legal usage in 1961, the term "bribery" had a generic meaning; and, as noted above, the generic definition is essential to vindicate Congress' purpose—*i.e.*, to deprive organized crime of the use of interstate facilities to carry on bribery schemes that increase illegal revenues.[8]

---

[7] Some states prohibit commercial and official bribery in the same statute. See our initial brief at 27 n.23.

[8] While it is true that *Nardello* states in a footnote that "[b]ribery has traditionally focused upon corrupt activities by public officials" (393 U.S. at 293 n.11), the Court did not purport to undertake a full examination of the evolution of the crime of bribery. Even at common law, as petitioner concedes (Reply Br. 4), the term bribery extended beyond the corrupt actions of public officials, reaching corruption of private persons such as voters and witnesses. In England, commercial bribery has been a crime since 1906. See our initial brief at 26-27 n. 22.

Although petitioner protests that a generic interpretation will extend federal jurisdiction over state crimes (Reply Br. 16-17), there can be no doubt that Congress intended to aid local law enforcement officials by condemning use of interstate facilities to carry on activities illegal under local law. This is not a case such as *Rewis* v. *United States*, 401 U.S. 808 (1971), or *United States* v. *Bass*, 404 U.S. 336 (1971), in which local criminal activities had no significant nexus with interstate commerce. Where, as here, the government proves that the defendant used the facilities of interstate commerce for a purpose forbidden by Congress, there is no question of intruding impermissibly into the sphere of state regulation. See *Erlenbaugh* v. *United States*, 409 U.S. 239, 245-247 (1972); *United States* v. *Culbert*, 435 U.S. 371, 379-380 (1978); *Hoke* v. *United States*, 227 U.S. 308, 321-322 (1913).

4. Petitioner finally contends (Reply Br. 19-25) that the statute is unconstitutionally vague in violation of the Due Process Clause, citing *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). However, the statute presents no vagueness problem. The literal dictionary meaning of the term bribery is generic. Both Congress and the states applied the term generically in a wide variety of criminal laws prior to passage of the Travel Act. The legislative history shows that Congress understood the word bribery in its generic sense, with no Congressman or governmental representative ever suggesting that the term should be limited to its "common law" meaning. Moreover, the dominant statutory purpose strongly supports the

generic construction. Under these circumstances, there is no uncertainty that requires a limiting interpretation.

Petitioner also argues that the decision of the court of appeals operated retroactively and unforeseeably, citing *Marks* v. *United States*, 430 U.S. 188 (1977). However, petitioner received fair warning from the text of the Travel Act, which extends to bribery prohibited by state statute without limitation on its kind. He also received notice that his actions were illegal from the Louisiana commercial bribery statute that triggered application of the Travel Act. This Court's 1969 *Nardello* decision placed petitioner on notice that the Act would not be confined to common law meanings or be given an unnaturally narrow reading. Moreover, prior to petitioner's actions, the United States Court of Appeals for the Fourth Circuit (the only court of appeals to have decided the question) had held unanimously that commercial bribery was covered by the Travel Act. *United States* v. *Pomponio*, 511 F.2d 953 (1975).[9]

The decision of the Second Circuit in *United States* v. *Brecht*, 540 F.2d 45 (2d Cir. 1976), on which petitioner relies, was not handed down until one year after he engaged in the illegal bribery scheme. There was thus no "conflict" in the circuits that could have

[9] Petitioner was well aware that his conduct was wrongful, as the evidence at trial established. See our initial brief at 8-9. There is thus no question of convicting a defendant who believed that his actions were proper. See, *e.g.*, *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340, 342 (1952).

misled petitioner or caused him to believe that his conduct was lawful.[10]

For the foregoing reasons and the reasons stated in our initial brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

[10] The present case thus has no similarity to *James* v. *United States*, 366 U.S. 213, 221-222 (1961), where a prior decision of this Court had held that the conduct challenged in the indictment was lawful.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 301949 94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-959

VINCENT R. PERRIN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION UNDER RULE 41(5) FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND PETITIONER'S SUPPLEMENTAL BRIEF

LEONARD B. BOUDIN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
30 East 42nd Street
New York, New York 10017

ALBERT J. AHERN, JR.
One Skyline Place
5205 Leesburg Pike
Baileys' Crossroads,
Virginia 22041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-959

VINCENT R. PERRIN, JR.,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

MOTION UNDER RULE 41(5) FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

Petitioner, by his counsel, moves this Court for an Order under Rule 41(5) of the Rules of this Court granting special leave to file forty printed copies of the annexed supplemental brief and ten copies of the statement of Assistant Attorney General Philip A. Heymann annexed to this motion as Appendix A.

The brief and the Statement discuss intervening matters that were not available in time to have been included in petitioner's brief in chief or in petitioner's reply brief. These are matters which arose during oral argument as well as corrections of petitioner's reply brief.

The statement of Assistant Attorney General Heymann which came to petitioner's attention subsequent to the oral argument at least impliedly adopts petitioner's conception of the Travel Act's proscription of bribery as directed at the bribery of government officials rather than at commercial fraud.

Petitioner's counsel regret the need to burden the Court with an additional brief, particularly after oral argument. However, petitioner's counsel who argued the case was retained for that purpose shortly prior to the oral argument and received the Government's reply brief quite late.

Respectfully submitted,

LEONARD B. BOUDIN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
30 East 42nd Street
New York, New York 10017

ALBERT J. AHERN, JR.
One Skyline Place
5205 Leesburg Pike
Bailey's Crossroads,
Virginia 22041

Counsel for Petitioner

October 9, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-959

VINCENT R. PERRIN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

LEONARD B. BOUDIN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
30 East 42nd Street
New York, New York 10017

ALBERT J. AHERN, JR.
One Skyline Place
5205 Leesburg Pike
Bailey's Crossroads,
Virginia 22041

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-959

VINCENT R. PERRIN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

I.

The Chief Justice, during the oral argument, inquired whether a study of the legislative history of 18 U.S.C. § 1952 was necessary if the term "bribery" had a plain meaning. Such a plain meaning cannot be found in the several dictionaries to which the Government referred in its Reply Brief (p. 3) supplementing its original brief (p. 18) for two reasons. First, even those dictionaries do not

limit themselves to the more colloquial definition suggested by the Government; each of them has alternate definitions, of which the principal one is always the one with the legal connotation we suggest, and the alternates vary from obsolete definitions to the definitions suggested by the Government. There is no basis for assuming that Congress chose from among these different definitions the ones selected by the Government in its briefs.

Second, as we indicated to the Court, the standard legal dictionaries, *Bouvier* and *Black*, contain under the heading of bribery only the definition that we suggest, namely, the common law meaning of the term. Thus the first definition in *Bouvier* is as follows:

> BRIBERY. *In Criminal Law.* The receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity. Co. 3d Inst. 149; 1 Hawk. Pl. Cr. c. 67, s. 2; 4 Bla. Com. 139; 2 Russ. Cr. 122; Clark, Cr. L. 335, 33 N.J.L. 102; 10 Ia. 212; *Bouvier's Law Dictionary*, Students Edition, 138-9 (1928).

and the remainder are variations of the same theme, namely, public office or public function. The same is true of Black's Law Dictionary which defines bribery as follows:

> "*Bribery.* The offering, giving, receiving, or soliciting of anything of value to influence action as an official or in discharge of legal or public duty. Allen v. State, 63 Okl. Cr. 16, 72 P.2d 516, 519. The corrupt tendering or receiving of a price for official action. State v. London, 194 Wash. 458, 78 P.2d 548, 554. The receiving or offering any

> undue reward by or to any person concerned in the administration of public justice or a public officer to influence his behavior in office. Any gift, advantage, or emolument offered, given or promised to, or asked or accepted by, any public officer to influence his behavior in office. Model Penal Code § 240.1. The federal statute includes "any officer or employee or person acting for or on behalf of the United States, or any department or agency or branch of government thereof, . . . in any official function". 18 U.S.C.A. § 201.
>
> "At common law, the gist of the offense was the tendency to pervert justice; the offering, giving, receiving or soliciting of anything of value to influence action as a public official; corrupt agreement induced by offer of reward. The term now, however, extends to many classes of officers and is not confined to judicial officers; it applies both to the actor and receiver, and extends to voters, legislators, sheriffs, and other classes. All persons whose official conduct is connected with the administration of the government are subjects; including persons acting under color of title to office. State v. London, 194 Wash. 458, 78 P.2d 548.
>
> "I.R.C. § 162 denies a deduction for bribes or kickbacks". *Black's Law Dictionary*, 173 Fifth Edition (1979)

As we indicated during oral argument, it is more reasonable to assume that the Congress, and certainly the legislative draftsmen employed by the Congress, used the term "bribery" as the term is used in legal dictionaries. This was what Mr. Justice Holmes meant when he referred to "familiar legal expressions in their familiar legal sense" *Henry* v. *United States*, 251 U.S. 393, 395.

This typically succinct statement is quoted with approval by Mr. Justice Frankfurter in his Benjamin N. Cardozo Lecture before the Association of the Bar of the City of New York, March 18, 1947, 47 Col.L.R. No. 4, pp. 528, 537 (May 1947). Even if this conclusion of two great judicial interpreters of legislation were not to be accepted by the Court in the present context, there still remains this problem: with respectable alternative definitions can it be said that one definition or another constitutes plain meaning, thereby precluding any inquiry into legislative history.

Significantly, Black's Law Dictionary recognizes that there is a distinctly different form of misconduct, not necessarily criminal, entitled "commercial bribery" which reads as follows:

> *Commercial bribery.* A form of corrupt and unfair trade practice in which an employee accepts a gratuity to act against the best interests of his employer. People v. Davis, 33 Cr.R. 460, 160 N.Y.S. 769. May assume any form of corruption in which an employee is induced to betray his employer or to compete unfairly with a competitor. Freedman v. U.S., 437 F.Supp. 1252, 1260. *Black's Law Dictionary, supra*, p. 245.

II.

Mr. Justice Marshall has commented upon the sparseness of the legislative history of the statute involved. *Rewis* v. *United States*, 401 U.S. 808, 811. Our reply brief indicated that whatever there was in legislative history supported the common law definition (Petitioner's Reply Brief at pp. 13-15). But upon oral argument the Government, in response to the Court's inquiry conceded that the strongest support for its argument was to be

found in a statement of Senator Keating expressing his aversion to the bribery of athletes. The concession is most significant since the statement is obviously entitled to no weight. Senator Keating was not a draftsman of S. 1653, which became the statute here involved; he made his remarks at the close of the Senate hearings and there was no suggestion that the draft of the bill before the Senate Committee on the Judiciary should be changed, nor was it, to reflect his views on bribery in sports. *(The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, etc. Before the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. (1961)).* Neither Attorney General Kennedy nor Assistant Attorney General Miller, who testified at length in support of the bill, made any reference to this subject. Nor is it referred to in the legislative debates in Congress or in the relevant Senate Report. (S. Rep. No. 644, 87th Cong., 1st Sess. (1961)).

It is inconceivable that the intention of the Congress or even of the Judiciary Committee should be determined by a chance remark of a single senator at the close of the hearings on a bill. That the inference of legislative intent suggested by the Government is farfetched and indeed impossible is shown by the absence of similar comment in the House Judiciary Committee hearings or report. (H.R. Rep. No. 966, 87th Cong., 1st Sess. (1961)).

While apparently not giving it the same weight, the government during oral argument referred to remarks of Attorney General Kennedy and others on the subject of labor corruption. But these related to S. 1655, a companion bill dealing with the unrelated subject of immunity legislation. The discussion of S. 1653, which became 18 U.S.C. § 1952 contains no reference to labor corruption. It would be a strange way to interpret the critical word in the instant statute which does *not* deal with labor corruption by referring to a discussion on a very different companion bill

to which the matter of labor bribery *was* relevant. The interpretation of statutes is not a conjuring trick; it is a search for legislative intent.

III.

Petitioner's counsel made reference in oral argument to 18 U.S.C. § 1961(a)—the racketeering statute, but regrettably in hindsight, not with clarity. The significance of that statutory provision (Petit. Reply Brief, p. 8) is that Congress indicated therein its ability to proscribe "sports bribery" (18 U.S.C. § 224) and payments to "labor organizations" (29 U.S.C. § 186) with specificity when it desired to proscribe those so-called non-public function activities. In contrast, Congress referred in 18 U.S.C. § 1961(a) to only one section, (18 U.S.C. § 201) as "relating to bribery," a reference which, in addition, shows what Congress meant by the term "bribery."

IV.

During oral argument petitioner suggested that the consequence of defining the term bribery broadly was to turn federal misdemeanors into federal felonies without any support in the legislative history. We referred the Court to two such federal statutes, 29 U.S.C. § 186 and 18 U.S.C. §215, which would be transformed so drastically if bribery were to be defined differently from the common law. Not only is there no basis for the assumption, but it would be irrational to assume that the Congress intended to make a telephone call the difference between a misdemeanor and a felony where gratuities are paid to labor union and bank officials under 29 U.S.C. § 186 and 18 U.S.C. § 215 respectively.

V.

The Government's Reply Brief (p. 3) refers to "[s]tate and federal bribery laws, without limitation on the type of bribery", existing in 1961. Its reference presumably is to its original brief in which it referred to a number of federal statutes (Government Brief, pages 23-26). In fact, the Government's half dozen examples, with a single exception, deal with public functions. The single exception is significantly entitled "Commercial bribery", 27 U.S.C. § 205(c) (1935).

VI.

The Government's Reply Brief disputes the application of *Marks* v. *United States*, 430 U.S. 188 (Gov't. Reply Br., p. 10), on the ground that "[p]etitioner received fair warning from the text of the Travel Act" (*ibid.*), that "[t]his Court's 1969 *Nardello* decision placed petitioner on notice that the Act would not be confined to common law meanings or be given an unnaturally narrow reading," (*ibid.*), and that "prior to petitioner's actions" the United States Court of Appeals for the Fourth Circuit rendered its opinion in *United States* v. *Pomponio*, 511 F.2d 953 (*ibid.*). The Government's dismissal of *Marks* assumes an absence of ambiguity in the term "bribery" as used by *Congress*. This predicate is belied by the variety of definitions commonly used and assumes that petitioner was limited to the definition selected herein by the Government. The Louisiana commercial bribery statute which the Government says gave petitioner "notice" (Gov't. Reply Brief, p. 10), did not tell Petitioner what *Congress* intended by its use of the term bribery and is not the relevant notice to which petitioner is entitled.

The Government's reliance upon *Nardello* is a two-edged sword. All that *Nardello* decided was that the term

"extortion" would "not be confined to common law meanings or be given an unnaturally narrow reading," to use the Government's formulation (Gov't. Reply Br., p. 10). This was certainly not notice to petitioner that the term "bribery" would not be confined to common law meanings" (*ibid.*), and it would not be "an unnaturally narrow reading" to give bribery its common law meaning. Indeed, the reasons given in *Nardello* for a broad construction of the term "extortion," are totally inapplicable to "bribery". *Nardello* is predicated upon the following factors, which are inapplicable to bribery:

> (1) a broad definition of extortion was required because of a narrow conception of bribery as limited to public officials (*Nardello, supra*, p. 293, n.11);
>
> (2) a legislative history of extortion by organized crime;
>
> (3) the blending of extortion and blackmail by legislation and judicial decision;
>
> (4) extortion by legislators alone was inconsistent with a statute directed at extortion by organized crime;
>
> (5) state labels of blackmail could not obscure the extortionate conduct of Nardello under a blackmail statute describing extortionate conduct.

There is another difficulty with the Government's reliance upon *Nardello* as giving notice to the Petitioner: We all recognize that we are dealing in a sense with a fiction since laymen do not normally read Supreme Court decisions and certainly not court of appeals' decisions before committing crimes or otherwise. But accepting the fiction as a form of reasonable constructive notice, *Nardello* in fact gives notice to the world that "bribery has traditionally focused on corrupt activities by public officals" (*United States* v. *Nardello*, 393 U.S. at 293 n.11).

Therefore it was more reasonable for the hypothetical layman to rely upon the Court's definition of bribery rather than upon its definition of extortion where the layman engaged in an act of bribery, rather than extortion. This clearly brings the Petitioner under the doctrine of *Marks* v. *United States*, 430 U.S. 188, 199-196 (Powell, J.).

During the oral argument the Court's attention was called to the Government's brief in *Nardello* in which it stated:

> "Furthermore, joined in the same clause with extortion is an offense which has as its normal focus the corruption of public officers: interstate travel to promote 'bribery' is also forbidden. In this context, reading 'extortion' as confined only to acceptance of unauthorized fees by public officials, in states which retain that classification, would render the 'extortion' branch of the clause practically superfluous." *United States* v. *Nardello, October Term 1978, No. 51, Brief for the United States*, page 9.

The Government theory, as expressed to the Court in *Nardello*, was that since the term *bribery* had a narrow definiton, limited to public officials, a broader one was required for the term *extortion;* otherwise the extortion provision was superfluous insofar as the corruption of public officials was involved. Some members of the Court suggested that perhaps a different Solicitor General was entitled to a different view of the meaning of the term bribery. Petitioner does not dispute the Government's right to change its definition of the term bribery. The question here is quite different: was not Petitioner put on notice of the Government's understanding of the term in *Nardello;* hence, until the Government announces a change in its policy, he should not be punished for relying

upon its definition. This is the rule of *Raley* v. *Ohio*, 360 U.S. 423.

VII.

The Government argues against the application of the rule of lenity on the ground that "Congress understood the word bribery in its generic sense with no Congressman or Government representatives ever suggesting that the term should be limited to its common law meaning." (Gov't Reply Br., p. 9). The difficulty with this argument is that there is no "legislative history" to show Congress' understanding, and it may equally well be argued that no Congressman ever suggested that the common law definition of the term should be expanded. Indeed, in the scales of statutory construction one would expect that at least three principles would impose this requirement on the Government. First, the interpretation of statutes according to the common law, second, the use of "terms of art" in their historical sense, *Morrissette* v. *United States*, 342 U.S. 246, 263 (Jackson, J.) and finally the rule that penal statutes are to be construed narrowly, a doctrine promulgated in *United States* v. *Wiltberger*, 5 Wheat 76, and repeated to this day.

The appropriateness of this doctrine here is emphasized by the admission of the Government on oral argument that only three prosecutions of commercial bribery under the Travel Act reached the courts of appeals. Of these, of course, one was *United States* v. *Brecht*, 540 F.2d 45 (5th Cir. 1976), which held the Travel Act inapplicable to commercial bribery. The others were *United States* v. *Pomponio*, 511 F.2d 953 (4th Cir. 1975) and the present case. The Government referred, too, to several district court decisions although not by name, and the Court might wish to look at them. But even with these few cases thrown into the scales it is a reflection on a statute

ranging from ambiguity to desuetude that so few prosecutions have been brought in 18 years. So far as the reported cases are concerned, only two groups of defendants have had their convictions litigated in and affirmed by courts of appeals to their detriment—those in *Pomponio* and those in the present case. These may indeed be the last such cases since the House Committee on the Judiciary, in considering the proposed federal criminal code, has recommended against the continuation of the Travel Act in the field of bribery, a matter leading to a recent protest by Assistant Attorney General Heymann, during the hearings on *Criminal Code Reform*, *infra*.

This rare application of a statute undoubtedly reflects its ambiguity and is a proper occasion for the application of the principle of lenity. Otherwise Petitioner's may be the last criminal conviction for use of interstate facilities, such as the telephone, to engage in interstate commerical bribery.

VIII.

Subsequent to the oral argument petitioner's counsel's attention was called to a significant statement made on September 6, 1979 by Mr. Philip B. Heymann, Assistant Attorney General, Criminal Division of the Department of Justice before a subcommittee of the House Judiciary Committee in protest against the subcommittee's recommendation that the Travel Act be radically amended, Mr. Heymann clearly recognized that the reference to bribery was a reference to the bribery of "state and local public officials.[1] Thus he stated

> The third anti-public corruption base removed by the Subcommittee is the Travel Act, 18

[1] Mr. Heymann referred in a different context to the pendency of this case before the Court. *Id.* at 28.

U.S.C. § 1952, that punishes interstate travel or the use of interstate facilities to engage in various violations of state law, including state bribery and extortion laws. This statute has also been used in a number of cases involving state and local public officials.

Criminal Law Reform, Hearings before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., Sept. 6, 1979, p. 23 (Department of Justice Release)

IX.

Petitioner and the Government differ in their interpretation of state laws relating to bribery and commercial bribery. To the extent that the matter is deemed by the Court to be relevant we respectfully suggest that an independent examination of these statutes is appropriate. In this connection we advise the Court that the forthcoming law review Note referred to by petitioner (Pet. Reply Brief p. 15, n.12a) is an article by D. Bruce Gabriel, *The Scope of Bribery Under the Travel Act*, 70 The Journal of Criminal Law and Criminology 337 (Fall 1979).

X.

We also wish to advise the Court of three references in the briefs requiring correction:

1. In *United States* v. *Dansker*, 537 F.2d 40 (3d Cir. 1976) (Pet. Reply Br. 6) the Third Circuit reversed a conviction under the Travel Act, 18 U.S.C. § 1952, because it construed a state official bribery statute, not a commercial bribery statute as we suggested, as reaching "the traditional concern of the law of bribery—conduct which

is intended at least by the alleged briber as an assault on the integrity of a public office or an official action" 537 F.2d at 48. The Government's quotation (Govt. Br. 3, n.3) is dictum without supporting authority.

2. *United States* v. *Forsythe*, 560 F.2d 1127 (3d Cir. 1977) (Pet. Reply Br. 6) involved a prosecution under 18 U.S.C., §§ 1961-1968 a fact not clearly stated.

3. The Government's Reply Brief (p. 7, n.7) refers to a "subsequent report" to Congress. This of course refers not to the Travel Act but to a subsequent statute as the Government elsewhere indicates (Govt. Br., p. 31).

Respectfully submitted,

LEONARD B. BOUDIN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
30 East 42nd Street
New York, New York 10017

ALBERT J. AHERN, JR.
One Skyline Place
5205 Leesburg Pike
Bailey's Crossroads,
Virginia 20041

Counsel for Petitioner

October 9, 1979